Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

ANTHONY CARMINATI, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Your Petitioner Anthony Carminati, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit wherein it affirmed the judgments of the United States District Court for the Southern District of New York denying two motions of the petitioner who (a) sought relief under authority of Title 28 sec. 2255 U.S.C. from an improperly imposed sentence in violation of Rule 32(a) F.R. of Cr. P. and (b) claimed the right to be resentenced under the proper section of the proper law instead of being forced to serve a term of imprisonment imposed under an illegal sentence, basing his prayer on Rule 35 of the F.R. of Cr. P. and/or Title 28 sec. 2255, U.S.C., plus the fact that *all* of the courts below agreed that he had been "convicted upon an indictment charging him with a conspiracy in violation of Title 18 sec. 371 U.S.C. to receive, possess and sell heroin in violation of the federal narcotic laws. 21 U.S.C. secs. 173, 174; 26 U.S.C. secs. 4701, 4703, 4704(a), 4724(c), 4771(a)—but was still illegally sentenced as a violator of Title 21 sec. 174 U.S.C. as amended by the Narcotics Control Act of 1956 which entails more severe penalties and takes away any right or privilege of seeking parole.

Petitioner has been confined since February 14, 1957, 309 days of which were spent at the West Street Federal House of Detention in New York City, for which he has received no credit and since then, up to the present time, is confined in the Federal Penitentiary at Leavenworth, Kansas.

OPINIONS BELOW

On February 18, 1960 the District Court denied the motion on the question of allocution (25 F.R.D. 31) and on April 4, 1960 denied the motion to correct the illegal sentence under Rule 35 F.R.Cr.P. and or under sec. 2255 of Title 28 U.S.C. This two-word opinion is reproduced on page 87 J.A.

Both opinion-orders were affirmed by the Court of Appeals on August 22, 1960 (281 F. 2d 908) (1960) *sub nom. United States* v. *Galgano and Carminati*, and are reproduced on pages 18a-24a of the appendix herein. A petition for rehearing was denied on September 28, 1960 and this Court granted an extension of time within which to file a petition for a writ of certiorari to February 1, 1961 and that extension was further enlarged to and including February 15, 1961.

JURISDICTION

The jurisdiction of this Court is invoked under Sec. 1254 of Title 28, U.S.C.A. and Rule 37(c) of the Federal Rules of Criminal Procedure.

RULES, STATUTES, CONSTITUTIONAL PROVISIONS INVOLVED AND CONGRESSIONAL LEGISLATIVE HISTORY

Printed in appendix at pages 1a to 18a.

STATEMENT OF THE CASE

This petition for a writ of certiorari is based in the main on two points, the allocution problem and the sentence imposed on Anthony Carminati, after being indicted, tried and convicted under 18-371 U.S.C,

On January 14, 1957, a jury presided over by the Hon. Edw. Weinfeld, U.S. District Judge for the Southern District of New York, returned a verdict of "guilty on count 14" against your petitioner Anthony Carminati, in Criminal case # C-151-226.

The indictment under which Carminati was charged, tried and convicted, accused the petitioner and fourteen other defendants with a conspiracy under Title 18 U.S.C. sec. 371 to violate certain sections of the federal narcotic laws.

In a previous indictment (C-151-78) returned on October 1, 1956, Carminati was charged with conspiring to violate the narcotic laws with the last overt act listed as taking place in March of 1956. In the indictment under which he was tried and convicted, the charges were identical except for the fact that an additional overt act was added claiming that "In furtherance of the said conspiracy and to effect the objects thereof, on or about the 22nd day of August, 1956, in the vicinity of the Delmont Bar, 624 East 180th Street, Bronx, N. Y., Anthony Carminati and Ralph Russano had a conversation."

Both indictments were bottomed by Title 18 U.S.C. sec. 371, and recited that the offense charged was *a conspiracy to violate* the narcotic laws.

At the trial, a narcotics agent testified that he *saw* Carminati talking to Ralph Russano, but did not hear what the conversation was about. His testimony was uncorroborated and was treated as having no value in the prosecution of the case by the trial court and the Government since the prosecutor made note of that witness' testimony thusly:

> "With respect to the request of Mr. Kove that in the event the jury disbelieved Oglesby's testimony as to

> the conversations alleged to have taken place between Oglesby and the defendant Carminati, that then the jury should find the defendant Carminati not guilty, it is the position, your Honor, of the Government, that unless you held that such request was untimely, that as a matter of substance I believe the defendant is entitled to that charge because the only other evidence against Carminati in the case is the meeting with Russano on August 22 * * * so that as to the evidence of the events of August 22, standing alone, I doubt whether your Honor would permit it to go to the jury." (J.A. 16).

Thereupon, the jury was recalled and the court gave the following instruction:

> "I am sorry, ladies and gentlemen, but there is one instruction I overlooked at the time of my main charge that I desire to give you, and that is with respect to the defendant Carminati, as to whom the principal testimony was given by the witness Oglesby, and it makes reference to four different incidents. If at the conclusion of your review of all the evidence you disbelieve Oglesby's testimony, that is, disbelieve in substance his statements made with respect to the defendant Carminati, then I will instruct you to find the defendant Carminati not guilty." (J.A. 16).

Oglesby was the paid informer used by the Government in the case against Carminati and had testified to four different occasions when he claimed he had direct contact or conversations with the petitioner concerning narcotics with the last meeting taking place during the month of February, 1956. **All of his testimony was uncorroborated.**

Salvatore Russano and Ralph Russano, father and son, two other defendants pleaded guilty on December 12, 1956 to the conspiracy count and other substantive counts, but were not sentenced until February 5, 1957 when Frank Rich, Michael Galgano, William McKenney, Jr. and Carminati, who, as co-defendants had been found guilty by the jury on January 14, 1957 presented themselves before the court. Judge Weinfeld imposed various sentences on each defendant seeking guidance from the prosecutor in each and

every case as to whether the convictions came under the new or old provisions of the Narcotic laws as amended by the enactment of the Narcotic Control Act of 1956.

Carminati's sentencing was postponed until February 14, 1957 upon application of his counsel, but petitioner was promptly warned that he had to understand that he was not going to receive any credit towards his time "pending sentence." (J.A. 20-21).

On February 14, 1957 Carminati appeared before Judge Weinfeld for sentence, and without being afforded the right of allocution, as provided for under Rule 32(a) of the F.R. of Cr. P., the court imposed a ten year term of imprisonment thusly:

> "After taking into consideration all the factors which the Court deems pertinent in a matter of this kind, the defendant is sentenced to a term of 10 years." (J.A. 43).

The record or the oral pronouncement did not indicate under what statute the sentence was being imposed, but the Judgment and Commitment order (Form 25) signed by Judge Weinfeld read:

> "IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully, and knowingly conspiring to violate the narcotic laws of the United States. (Title 26, secs. 4704(a), 4701, 4703, 4724(c) and 4771(a), Title 21, secs. 173 and 174, and Title 18, sec. 371, U.S.C.) as charged in count fourteen, and the defendant duly represented by counsel, having admitted he is the same person previously convicted on one separate Federal Narcotic Violation, **and the court having asked the defendant whether he has anything to say why judgment should not be pronounced,** and no sufficient cause to the contrary being shown or appearing to the Court, IT IS ADJUDGED that the defendant is guilty as charged and convicted. IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN YEARS on count fourteen. * * * "
>
> /s/ WEINFELD, J.

The balance of the defendants were treated thusly:

Joseph Ambrosini, Ada Volkell and David Shackleford were tried before Judge Levet and the jury returned verdicts of guilty against all of them with Ambrosini receiving a ten year term, Volkell was sentenced to six years in a Federal prison for women, and Shackleford was sentenced to two years on count 14, the conspiracy count under sec. 7237(a) of Title 26. **(See complete text of this opinion reproduced in J.A. pp. 74 to 79.)**

Mary Lou Brousett Russano, the wife of Ralph Russano was sentenced to a five year term, but on appeal her conviction was reversed on the ground that the conspiracy's continuance had been interrupted sufficiently, as shown by the evidence, to warrant the reversal. Carrenza Howard received a two year sentence and the charges against Donald Bauer, Robert Guippone, Sebastian Della Universita, Carlos Ruiz and *Michael Botto* were nolled.

Botto, a co-defendant in 151-79 and 151-226, pleaded not guilty to both those indictments and his case was severed at the request of the Government before Carminati's trial was ready to be tried.

IN A SUBSEQUENT INDICTMENT — 151-284, FILED IN DECEMBER OF 1956, BOTTO WAS CHARGED WITH CONSPIRING TO VIOLATE THE NARCOTIC LAWS UNDER *18 U.S.C. sec. 371*, AND ON HIS PLEA OF GUILTY, RECEIVED A TWO-YEAR UNSUPERVISED SUSPENDED SENTENCE.*

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* At both Carminati's and Ambrosini's trial, Botto appeared as a Government witness and admitted that he trafficked in narcotics but had given up the business in June of 1956 and became a paid informer for the Bureau of Narcotics. (P. 132 transcript.). In his opening statement to the jury in Ambrosini's trial, John Lankenau, the prosecutor who participated in the conviction of Carminati, said: "* * * The Government will prove that Botto joined the conspiracy in 1955 and began to buy heroin from Ralph and Salvatore Russano—he had partners, Frank Rich and David Shackelford and latter William McKenney, Jr. * * *".

On direct examination Botto stated that the agents had paid him from October 1955 through February 1956 to "make" cases, but thought he received some money in December of 1956. (Tr. p. 104.)

Petitioner appealed the conviction but former counsel made no attack on the sentence or the procedure attendant thereto. The Court of Appeals affirmed the judgment of the District Court on August 23, 1957 (247 F.2nd 640) and this Court denied certiorari on November 7, 1957, 355 U.S. 883, 78 S. Ct. 150 (1957).

On February 14, 1957 he was removed to the Federal Detention House at West Street in New York City to await transfer to Leavenworth Penitentiary. On February 20, 1957 a new attorney, Menahim Stim in association with Jacob Friedman filed the notice of appeal with the District Court and a copy of that notice was delivered to the warden of the Detention House on the 21st.

On February 28, 1957, Carminati was coerced into signing a waiver under Rule 38(a) of the Federal Rules of Cr. Procedure by employees of the Detention House and spent THREE HUNDRED AND NINE (309) DAYS thereafter at West Street WITHOUT receiving any credit towards the ten year sentence imposed.*

In the latter part of 1959 and the early part of 1960, present counsel filed two motions [illegible] the first one seeking relief for Carminati by having him properly resentenced because of the trial court's failure to grant him the right of allocution under Rule 32(a) and the second one was based on his right to a reduction or correction of sentence under Rule 35 of the F.R. of Cr. P. contending that the sentence of ten years, as imposed, was excessive, beyond the maximum authorized by statute, illegal

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* This information was supplied to Judge Weinfeld on January 11, 1960 at the time of the oral argument had in connection with the plea for relief under the allocution motion, and renewed formally in December of 1960 in a motion under 2255 argued before the Hon. Palmieri, E., U.S.D.J.S.D.N.Y., and *denied*, not reported here because the time for appeal from that decision has not expired, but petitioner asks this Honorable Court to take judicial notice of the proceedings which will indicate that all of the employees of West Street and the warden joined in denying that any pressure was used to secure Carminati's signature to the waiver.

and because the defendant had been sentenced as a second offender under a statute for which violation he had neither been indicted nor tried nor convicted.

Both motions were denied. The first on February 18, 1960 and the second on April 4, 1960.

At the oral hearings on the allocution motion held January 11, 1960, Judge Weinfeld admitted that the failure to ask the defendant if he wanted to say anything before he was sentenced, was the first error of its kind in *his* court because, " * * * I am surprised that this happened, very frankly. I am usually extraordinarily careful and say, "is there anything you wish to add to the statement of counsel?" * * * "In any event, it is clear, the record is clear that the defendant himself was not asked if there was any statement that he desired to make or as to why sentence should not be imposed." (J.A. 46-59).

When the written memorandum was issued by Judge Weinfeld denying the first motion, Carminati, for the first time, learned that "The Court imposed the *minimum* sentence under the mandatory provisions of the Narcotic Control Act and in the face of the application was granted of necessity the same sentence would be compelled. To grant this application upon the facts here presented would be slavish adherence to form; it would exalt form over substance. Motion denied."

In denying petitioner's second motion for a reduction and or correction of sentence, the court made short shrift of Carminati's plea in a two-word opinion—"Motion denied." Cf. *U. S.* v. *McKenney and Galgano*, (181 F. Supp. 183) (Full opinion reported on pp. 83 thru 87 of the J.A. herein.)

Now, on April 4, 1960, having been referred to the McKenney opinion to see why his motion was denied, for the first time in more than three years after sentence was imposed on him, Carminati learned that he was sentenced under the 'built-in' conspiracy clause of Title 21 sec. 174 U.S.C., as amended, under the Narcotic Control Act of 1956, to the minimum term prescribed for second offenders under the newly amended act effective July 19, 1956, although the

trial court had been most precise in instructing the jury that from the evidence presented they would have to find him not guilty if Oglesby's testimony was disbelieved.

The appeal based on the denial of the two motions was heard on June 13, 1960 and on August 22, 1960 the Court of Appeals affirmed the denials and refused to grant a petition for rehearing on September 27, 1960. (281 F. 2d 908.)

This Court granted an extension until February 1, 1961 within which to file the petition for a writ of certiorari and further extended the time until February 15, 1961.

Your petitioner was confined at West Street Federal Detention House for 309 days from February 14, 1957, for which he received no credit, until he was transferred to the United States Federal Penitentiary at Leavenworth, Kansas, where he is now confined and serving the sentence pronounced by the court. He has been informed that he is classed as a second offender under the Narcotic Control Act of 1956 and is not entitled to seek parole under Title 18 sec. 4202 U.S.C. although a computation of his time from February 14, 1957 will reveal that if he had been correctly sentenced under the proper statute, he would now be eligible for release counting the good time allowance and the additional industrial good time earned.

As the record stands now, he is serving a sentence of ten years and 309 days.

QUESTIONS PRESENTED

1. Whether a court, acting pursuant to the Federal Rules of Criminal Procedure, may upon a showing of a failure to grant the defendant the right of allocution *as required under Rule 32(a) F.R.Cr.P.*, deny unto that defendant the right to be resentenced?

2. Whether a judgment entered against the defendant was invalid where the court admitted error that it had violated Rule 32(a) of the F. R. of Cr. P. by not offering the petitioner an opportunity to speak before sentence was imposed?

3. Whether a "conviction upon a single count indictment charging a conspiracy in violation of 18 U.S.C. 371 to receive, possess, and sell heroin in violation of the federal narcotic laws, 21 U.S.C. secs. 173, 174; 26 U.S.C. secs. 4701, 4703, 4704(a), 4724(c) 4771(a)," and the sentence imposed thereon can stand, when the *single* count of the indictment charged against defendant can be construed to be conduct which is punishable under three (3) separate sections, each of which entails a different punishment?

4. Whether the court erred when it instructed the jury how and when to find the defendant guilty under the "old" statute but prejudiced the defendant by sentencing him under the "new" statute which provided for more severe and harsher penalties?

5. Whether a verdict of "guilty on count 14" (with that count described by the court thusly: "Under the 14th count (Carminati) is charged with conspiracy *to violate* certain federal laws enacted in an effort to curb the sale and distribution of narcotics for illegal purposes" and further described " " " a *conspiracy to commit* a crime is made by statute, an entirely distinct offense, separate from the substantive crime itself)"—can be interpreted by the court when imposing sentence, as a conspiracy in violation of Title 21 sec. 174 U.S.C.; as amended by the Narcotics Control Act of 1956, where the evidence and instructions are given under and applicable to 18-371?

6. Whether the procedure provided for determining the identification and charging of the defendant with being a second offender, in order to be subjected to the harsher penalties provided for by the narcotic laws as amended by the Narcotic Control Act, is Constitutional, or void, because of being vague, indefinite and written in a manner contrary to the rights of the accused as provided for by the Fifth and Sixth Amendments and the applicable rules of the F.R. of Cr. P.?

SPECIFICATIONS OF ERRORS TO BE URGED

1. The Trial Court erred in failing to afford the defendant the right of allocution as required under Rule 32 (a) of the Federal Rules of Criminal Procedure.

2. The Trial Court erred when it imposed an excessive and illegal sentence under Title 21 U.S.C.-sec. 174 as amended by the Narcotic Control Act of 1956 rather than imposing sentence as authorized and required under Title 18-371 U.S.C.

3. The courts below erred in holding that the Petitioner was indicted and tried for violating Title 21-sec. 174 U.S.C. as amended by the Narcotic Control Act of 1956, when in fact he was indicted, tried and convicted under Title 18-sec. 371 of the U.S.C. with the Court of Appeals affirming that conviction and making same *res judicata*.

4. The trial court invaded the province of the jury by deciding that a guilty verdict upon an indictment charging a defendant with a conspiracy to violate five sections of Title 26 and two sections of Title 21, and tried after *first* noting that the charge against the defendant was under Title 18-371 of the U.S. Code that the sentence then had to be imposed under Title 21-174 as amended by the Narcotic Control Act of 1956.

5. The courts below erred in holding that the defendant was a second offender under the Federal Narcotic laws although the crime he was indicted, tried and convicted for was conspiring to violate Title 18-sec. 371, the General Conspiracy Statute, a separate and distinct offense.

6. The Statute or Act (N.C.A. of 1956) providing punishment for violating narcotic laws is unconstitutional because of being vague, indefinite and violates the V and VI Amendments to the Constitution.

REASONS FOR GRANTING THE WRIT

The Courts below have rendered and approved decisions that are in conflict with other district and Circuit Courts as well as creating conflict within its own district.

The Courts below have decided important questions of law contrary to earlier and *later* decisions of the district and Court of Appeals in the Second Circuit and both lower courts have decided important questions of Federal law in conflict with applicable decisions of the Supreme Court.

The Court below has sanctioned and approved the procedure of the district court which has applied sentencing procedures incorrectly and in violation of defendant's constitutional rights to such an extent as to call for the exercise of this Court's power of supervision.

The decision of the District Court and the Court of Appeals affirmance is in conflict with Rules 32 (a), 35, and 52 (b) of the Federal Rules of Criminal Procedure and incorrectly decides questions of general importance and substance relating to the construction and application of the Federal Constitution in a manner contrary to the applicable decisions and mandates of the Supreme Court.

ARGUMENT

I. Petitioner's Sentence Is Invalid for Failure of Trial Court to Comply With Rule 32(a), F. R. Cr. P.

Rule 32(a) requires that before imposing sentence, the trial judge shall afford the defendant an opportunity to make a statement "in his own behalf", and to present any information in mitigation of punishment.

This right to speak, known as the *allocutus*, has been handed down from the early common law and Rule 32(a) is designed to continue that ancient right in the federal courts.

A statement by counsel for defendant is no substitute for defendant's statement "in his own behalf". This is expressly recognized by the language use in Form 25 the Judgment and Commitment form in the Appendix to the Federal Rules of Criminal Procedure, wherein the Judgment recites:

> "* * * and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, * * *".

This specific language confirms the duty of the trial judge to make an affirmative inquiry *of the defendant himself*.

In the instant case, the record is clear and shows on its face that this important right was not afforded Carminati, and that the judge failed to ask him whether he had anything to say before sentence was imposed. (J.A. 38 to 43, 44 to 59, and 60 to 64).

Since those facts are undisputed and admitted both by the courts below and by the prosecution, it remains but to determine the effect of the failure to extend the right of allocution on the sentence imposed.

At the end of the 17th Century, the courts had already recognized the rule that a failure to ask the accused whether he had anything to say before sentence was imposed required reversal. See *Anonymous*, 3 Mod. 265, 87 Eng. Rep. 175 (K.B. 1689); *Rex* v. *Geary*, 91 Eng. Rep. 532 (K.B. 1689); *1 Chitty: Criminal Law 700* (1816); *4 Blackstone, Commentaries 375* (Lewis ed. 1897).

In *Ball* v. *United States*, 140 U.S. 118, 11 S. Ct. 761, at 767, the Supreme Court stated that the great weight of authority in the United States was that "a sentence must be set aside if the defendant has not been asked if there was any reason why sentence should not be pronounced". See also, *Schwab* v. *Berggren*, 143 U.S. 442. "This right has been jealously guarded from very ancient times", *People* v. *Nesce*, 201 N.Y. 111, 94 NE 655.

But the circuits are in conflict as to whether Rule 32(a) makes it mandatory for the trial judge to ask the defendant if he has anything to say before being sentenced, and have reached varying conclusions.

In *Couch* v. *U. S.*, 235 F. 2d 519 (D.C. Cir. 1956), the Court of Appeals, sitting *en banc* has ruled squarely that the Rule imposes upon the sentencing court the affirmative duty to ask the accused whether he desires to make a statement. All eight judges who participated in that decision agreed that the question could be raised in a proceeding under Title 28, Section 2255 U.S.C., but four judges decided that the rule would be applied as to future cases only, and not retroactively, while the other four judges expressly decided that it would even apply retroactively. Since there was no majority on this point, the Rule is applied in all cases after *Couch*, in the District of Columbia.

The *Couch* case was heard and decided by the full court because in two earlier decisions by different divisions of the court, different conclusions had been reached on the same question: See *Gadsen* v. *U. S.*, 223 F. 2d 627 (C.A.D.C. 1955); held that the sentencing court had an affirmative duty to ask the accused whether he desired to make a statement; *Hudson* v. *U. S.*, 229 F. 2d 36 (C.A.D.C. 1956), held that the rule was complied with when both counsel and defendant were present and counsel made a statement. The *Hudson* decision can now be discarded since the *Couch* Rule, agreeing with the holding in *Gadsen*, is now controlling.

As the dissenting opinion of two of the eight judges points out, the *Couch* decision constitutes a REVERSAL of the *Hudson* case.

In *Taylor* v. *U. S.* (No. 16726 C.A. 9), (not yet reported, decided December 12, 1960), the Ninth Circuit, found it necessary to hear the case *en banc;* the majority held that the defendant's right under Rule 32(a) may be waived by counsel, but four judges of that circuit felt that the right is personal and cannot be waived by counsel.

In *Calvaresi* v. *U. S.*, 216 F. 2d 891, at 901, the Tenth Circuit considered this question *inter alia*, and held that, in the absence of a request to speak, by the defendant in person, or a request through counsel for defendant to speak, the court cannot say that defendant was not afforded an opportunity to be heard before sentence was imposed. Cert. granted, 75 S. Ct. 522, and reversed.

In *Sandroff* v. *U. S.*, 174 F. 2d 1014 (C.A. 6-1949), the Sixth Circuit said:

> "While it would have been in appropriate conformity with the above rule had the district judge asked appellant Sandroff whether he desired to make a statement, it would appear from his inaction that Sandroff did not wish to do so. Though the judge posed the query, 'Anything further'?, neither appellant nor his attorney spoke up to the effect that Sandroff wished to be heard or to present information in mitigation of punishment. We cannot say that appellant was not afforded an opportunity to make a statement. There is nothing to indicate that he was shut off."

The First Circuit, in *Green* v. *U. S.* (C.A. 1-1959), 273 F. 2d 216, held that personal solicitation of a defendant to speak was not essential when he is represented by competent and experienced counsel of his own choice who has had an opportunity to speak and present information bearing on the matter.

In the *Green* case, the Court of Appeals referred a previous action of the defendant's (256 F. 2d 483) touching on the fact that he was ably represented by an experienced lawyer of his own choice, but that contention was insufficient for on April 18, 1960, the Supreme Court of the United States in Memorandum Opinion #596, misc. 80 S. Ct. 867, ordered

> "Petition for writ of certiorari to the United States Court of Appeals for the First Circuit granted limited to Question 3 * * * which reads:

> "Whether the judgment was invalidated where the court did not offer the petitioner an opportunity to speak before the sentence was pronounced. Case transferred to appellate docket and placed on Summary Calendar."

(It is the understanding of present petitioner that this case has been presented and argued during January, 1961, but as of the date this petition was printed, he was not aware of any opinion being rendered.)

In *Mixon* v. *U. S.* (C.A. 5-1954), 214 F. 2d 364, the Fifth Circuit held that defendant had waived his right to complain when he did not appeal from the sentence. But even there, Judge Rives, specially concurring, said that if this complaint were made on a direct appeal, affirmance would not be justified, since Rule 32 is mandatory. He points out that a defendant does not have to ask for or *demand* the right to speak, it must be "afforded" to him. "The rule contemplates no such demand, and clearly, without the necessity of any demand at that stage of the trial, the defendant's legal rights should be accorded to him by the court".

Petitioner Carminati states that it is no answer for the government to say that the rule was complied with "in spirit", or that such an inquiry would appear to be an idle gesture, or that defendant has shown no prejudice, or that a compliance with the rule would be, as Judge Weinfeld stated in the instant case, "slavish adherence to form; it would exalt form over substance".

Short shrift is made of all these arguments by the concurring opinion in *Couch* v. *U. S.*, 235 F. 2d 519, of Judges Fahy, Edgerton, Bazelon and Washington, who held, at page 521:

> "We wish also to make plain our own view that where the procedure now prescribed is not followed, error occurs THAT REQUIRES RESENTENCING in accordance with Rule 32(a), * * *.

"Rule 32(a) * * * has the force of law. See 47 Stat. 904 (1933), as amended, 18 U.S.C. Sec. 3772; Order of Feb. 8, 1946, Adopting Rules 32-39, 18 U.S.C.A. xix (1951); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 61 S. Ct. 422, 85 L. ed. 479; * * * (citations) * * *.

"We think the Rule means, as it says, that before imposing sentence the court shall afford defendant an opportunity to make a statement in his own behalf and to present information in mitigation of punishment. He may respond through counsel or he may remain silent. But the opportunity afforded must be PERSONAL, and *it is not when, as here, the judge asks only counsel if counsel has anything to say.* This court recognizes that the latter procedure should be changed. We think that where the procedure prescribed by the Rule is not followed, the error is NOT to be ignored as harmless."

After tracing the evolution and history of the right of allocution from ancient times up to the present, these four Judges clearly stated, at pages 523, 524:

"The retention of the practice no doubt was motivated by the desire of the law to preserve those salutary procedures in the administration of justice sanctioned by experience and sound policy . . .

"Rule 32(a) now extends the ancient procedure to *all* criminal cases in the federal courts. FEDERAL CASES WHICH ANTEDATE THE RULE, AND STATE CASES NOT GOVERNED BY IT, WHICH HELD THAT ALLOCUTION WAS NOT INDISPENSABLE, ARE THEREFORE OF NO RELEVANCY. For we think the Rule has now become a Command upon the federal courts. *To permit a departure from this command to go uncorrected in a particular case * * * in purview would be to permit a practice which violates the Rule to supersede a rule of law prescribed by the Supreme Court under authority of Congress after centuries of development in the common law.*"

Present counsel cannot improve upon the language of Judge Fahy and his associates, *supra*, in the *Couch* case. Enough has been said to show that there is a divergence, a difference of opinion between circuits, between judges in the same circuit, and all over the United States.

The right of allocution, under Rule 32(a) is involved in every criminal case where there is a conviction, in every district court of every circuit in the United States and its Territories. The Supreme Court, in the exercise of its supervisory powers, is called upon in your petitioner's pleading to interpret its own Rule so that it may be uniformly observed in every lower federal court.

We urge, therefore, that the failure to comply with Rule 32(a) invalidates the sentence and that petitioner be ordered resentenced, *nunc pro tunc*, as of February 14, 1957, the date of original sentence, and receive credit for all the time served since that date, for purposes of sentence, parole and good-time credits.

II. The Defendant Was Prejudiced and His Conviction Should Be Reversed, Set Aside or Amended Because He Was Indicted, Tried, Found Guilty, Convicted and Adjudged as Having Committed the Crime of Conspiring to Violate the Narcotic Laws, Title 18, Sec. 371, U.S.C., But Was Sentenced as a Second Offender Under the Special "Built-In" Conspiracy Statute of Title 21—Sec. 174 as Amended By the Narcotic Control Act of 1956

Only two witnesses connected Carminati with the conspiracy in any manner whatsoever; Oglesby, the paid informer who testified to four overt acts, the last one being in February of 1956, and Dugan, the Government agent, who *saw*, but did not hear, Carminati talk to a co-defendant on August 22, 1956.

Dugan's testimony was worthless and was recognized as such by both the trial judge and the prosecutor.

The trial judge instructed the jury to acquit Carminati if they did not believe Oglesby (J.A. 16) and the prosecutor conceded that Dugan's testimony standing alone was insufficient to go to the jury (J.A. 16).

In the opinion rendered in the instant case, the court below declared "Count 14 charges a conspiracy to violate 21 U.S.C.A. Sec. 173, 174. Such a conspiracy, if proven, constitutes in itself a violation of 21 U.S.C.A. Sec. 174."

If this statement is made as settled law, it is a precedent-making statement, and made without any decision or authority.

Your petitioner challenges the legality or correctness of it by referring this Honorable Court to the opinions of the Supreme Court and the various courts of appeal in the different circuits which have held that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. See *U. S.* v. *Rabinowich*, 238 U.S. 78, 35 S. Ct. 682; *U. S.* v. *Hirsch*, 100 U.S. 33, 25 L. ed. 539; *Braverman* v. *U. S.*, 317 U.S. 49, 63 S. Ct. 99; and the substantive offense is not merged in the charge of conspiracy, *Ellerbrake* v. *U. S.*, 7 Cir. 134 F. 2d 683, 685, and if the offenses are distinct in law, they are not identical. *Montrose Lumber Co.* v. *U. S.*, 10th Cir., 124 F. 2d 573, 575; *Robinson* v. *U. S.*, 10th Cir., 143 F. 2d 276; *Catrino* v. *U. S.*, 9th Cir., 176 F. 2d 884. See also *Gavieres* v. *U. S.*, 220 U.S. 338, 342, 31 S. Ct. 421, 55 L. ed. 489, and *Blockburger* v. *U. S.*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. ed. 306, and in *Pinkerton* v. *U. S.*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. ed. 1489, at page 643 of 328 U.S. and at page 1182 of 66 S. Ct., 90 L. ed. 1489, the Supreme Court said:

> "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established."

In spite of the authorities cited, the court below insists that "* * * such a conspiracy, if proven, constitutes in itself a violation of 21-sec. 174 * * *."

Such a decision is contrary to what the lower court said in answer to petitioner's first appeal based on different grounds. In *Carminati et al.* v. *U.S.*, 2 Cir. 247 F. 2d 640, the opinion read:

> "Appellant(s) was convicted upon an indictment charging him with *a conspiracy in violation of 18 U.S.C. 371* to receive, possess, and sell heroin in violation of the federal narcotic laws. 21 U.S.C. 173, 174. 26 U.S.C. secs. 4701, 4703, 4704(a), 4724(a), 4771(a)."

Evidently res judicata is treated lightly and not given the accepted weight and respect it commands, at least not by the Second Circuit when one has but to read the first and second opinions rendered in petitioner's cases and conclude that they are classic examples of dissertations in oppositeness.

Petitioner relies on the decision in *Patterson* v. *U.S.*, 2 Wheat., 221, 4 L. ed. 224, where this Court ruled that:

> "* * * It has been settled time out of mind to charge but one crime in one count, to accept but one general plea to it and to call upon the jury to make but one general response, 'guilty or not guilty.' Such procedure was obviously departed from here over appellant's objections and it may not be held that such a departure did not affect appellant's substantial right to be tried according to law. It is not the functions of the courts subordinate to the Supreme Court to introduce innovations of criminal procedure. * * *"

In *Gray* v. *U.S.*, 174 F. 2d 919, the court there said that it was error for the trial court to put the defendant in jeopardy on charges not made in the indictment and discharging the jury which did not render a verdict of guilty on the charge the court stated the defendant was sentenced under,—"and for that reason he is entitled to have the judgment against him avoided."

In *Gray* v. *U.S.*, *supra*, citing the *Patterson* v. *U.S.* case, *supra*, it was said . . . "It is beyond argument that a man cannot, under the Fifth and Sixth Amendments, be convicted and sentenced for an offense not charged and proven against him, and that is the situation in which the appellant stands upon the record before you. * * * A verdict is bad if it varies from the issue in a substantial matter."

In *Gaddis* v. *U.S.*, 280 F. 2d 334, 336, the rule of court was:

> "There is an inconsistency, however, in the pronouncement of sentence and the judgment of conviction. * * * When there is any ambiguity, the prisoner is entitled to have the language in the pronouncement construed most favorable to him."

But as far as your petitioner's case is concerned, what are the answers to these questions?

What was Anthony Carminati indicted for?

What was he charged with according to the charge and instruction given by the Court?

What was he convicted of?

What did that conviction call for as far as punishment was concerned?

Aside from the length of the sentence imposed, was Anthony Carminati sentenced under the right statute, based on the indictment, charge, instructions to the jury, the verdict and conviction?

With those questions propounded, can the statute be declared clear, unambiguous, not vague when Judge Levet in sentencing David Shackleford, another co-defendant of Carminati's, ruled:

> "* * * by the inclusion of the phrase 'or conspires' to in the listed substantive offenses of secs. 173 and 174 of Title 21 and the applicable sections under Title 26, I.R.C.—that separate substantive offenses have been created * * *" (J.A. 78) and then concludes that Shackleford should be sentenced under 26—sec. 7237(a) because it is the more lenient section of the Act.

Judge Levet reasons in the Shackleford matter, that the Government's reliance on *Williams* v. *U. S.*, 238 F. 2d 215, cert. den. 352 U.S. 1024, where the defendant failed to move pursuant to Rule 31(c) F.R.Cr.P. for a verdict indicating the degree of the crime, is error, and that because he had waived the defect in the form of the indictment was at the mercy of the prosecution. Judge Levet ruled "it is now a distinct offense to conspire to violate either the Jones-Miller Act or the Harrison Act, and the latter is not necessarily includible in the former." (J.A. 78)

Then the trial judge, the Hon. Weinfeld, E. D.J. in denying Carminati's prayer for relief under Rule 35 of the F.R. of Cr. P. and or Title 28, sec. 2255 U.S.C., refers the petitioner to his opinion issued September 2, 1959 in the matter of Galgano and McKenney, Jr., other defendants in the same indictment which reads:

> "Petitioners McKenney and Galgano, together with others, were convicted upon a trial by jury of conspiracy to violate certain provisions of the narcotics laws including section 174 of Title 21. × × ×
>
> Count 14 of the indictment, the only one which concerns us here, charges in four paragraphs that petitioners and others conspired to violate seven specific provisions of law, namely, 26 U.S.C., sections 4704(a), 4701, 4703, 4724(c), 4771(a), 21 U.S.C., sections 173 and 174. Next appears a list of overt acts allegedly done in furtherance of the conspiracy. At the end of the list there is the following citation: "(Title 18, United States Code, Section 371)". × × ×
>
> Petitioners proceed on the assumption that Congress by the inclusion of the words 'or conspires' under the 1951 amendments to Section 174 of Title 21 and section 7237(a) of Title 26, created a new, separate and distinct crime of conspiracy. The amendments to those sections simply related ot the matter of punishment and did not create a new crime. The crime of conspiracy is defined only in section 371 of Title 18. No definition appears in other sections. Thus it was proper to refer to the general conspiracy statute in the indictment. The evidence adduced upon the trial not only 'conclusively proved' a conspiracy to violate the narcotics laws but it left no doubt that the hard core of the conspiracy was to violate section 174 of Title 21. The verdict of the jury must be read 'guilty as charged in the indictment'; it cannot be interpreted as anything less. It follows that petitioners were validly sentenced under section 174 of Title 21." (See full opinion JA 83 through 86).

Yet, when Judge Weinfeld instructed the jury in your petitioner's case, he was careful to point out:

"Under the 14th count these four defendants, as well as others, are *charged with conspiracy to violate certain federal laws enacted in an effort to curb the sale and distribution of narcotics* for illegal purposes.

Generally speaking, *a substantive count* charges *a basic violation of the law*, for example, in this case, under the 3rd and 4th counts, the illegal sale of narcotics and under the 8th count facilitating the transportation of narcotics.

The conspiracy count against the four defendants and the three substantive counts against Rich *are in some respects governed by different laws.*

It is almost always characterized by secrecy, rendering detection difficult and requiring much time for its discovery. Because of this, *a conspiracy to commit a crime is made by statute an entirely distinct offense, separate from the substantive crime itself. I shall later discuss the conspiracy and the substantive counts in detail.*

The 14th count of the indictment charges a conspiracy to violate specific provisions of the Internal Revenue Code which were enacted by the Congress in an effort to curb the illegal traffic in narcotics.

Thus Sections 4701, 4703, 4704(a), 4724(c) and 4771(a) of Title 26 of the United States Code, *sometimes referred to as the Harrison Act, make it an offense to sell or distribute narcotics except from an original container to which are affixed revenue stamps;* and also make it illegal for one *to sell or distribute narcotic drugs without registering* with the Secretary of the Treasury for that purpose.

Then there are Sections 173 and *174 of Title 21* of the United States Code, *known as the Jones-Miller Act*, which make *it a crime to import a narcotic drug* into the United States *contrary to law*, or *to receive, conceal, buy, sell*, or in *any manner* facilitate the transportation, *concealment or sale of any such drug after importation—knowing the same to have been imported contrary to law.*

These are the laws which the Government charges the defendants conspired to violate.

This indictment is bottomed upon Section 371 of Title 18 of the United States Code, the conspiracy statute, which makes it an offense if two or more persons conspire to commit any offense against the laws of the United States, and one or more of such persons does any act to effect the object of the conspiracy.

Putting it another way—the defendants are not charged with violations of the Harrison Act or the Jones-Miller Act—those would be substantive violations. They are charged under the 14th count with a conspiracy to violate those laws."

Petitioner does not quarrel with that logic or pronouncement of law. He makes no complaint that the facts as pleaded may have referred to another statute. In his case, there is no question that the indictment charged him with a conspiracy under Title 18-371 *to violate* the 5 sections of title 26 and the two sections of title 21, but he is also sincere in his plea for justice in insisting that he was not charged with a conspiracy *in violation of* the 5 sections of title 26 or accused of conspiring *in violation of* title 21 secs. 173 and 174. There is a world of difference in the two ways that the indictment could have been drawn.

In the lower court's opinion against *Carminati*, 281 F. 2d 908, J. Waterman speaking for the court decided that "Count 14 charges a conspiracy to violate 21 U.S.C.A. 173, 174. Such a conspiracy, if proven, constitutes in itself a violation of 21 U.S.C. sec. 174."

But in *In re Snow*, 7 S. Ct. 556, this Court ruled . . .

> "It is to prevent such application of penal laws that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for the purposes of the indictment or prosecution, prior to the time the prosecution is instituted.
>
> * * * There was but a single offense committed prior to the time the indictment was found. This appears on the face of the judgment."

Finally, we have the opinion of Judge Palmieri who discussed in *Ogull* v. *U. S.*, 149 F. Supp. 272, *supra*, what he believed ought to be the procedure in securing justice

for a defendant when a case of the type now being considered confronts the trial court at the time sentence is to be imposed."

"• • • • In a prosecution for conspiring to unlawfully traffic in narcotics, between dates in 1956 where the applicable statute was amended so as to increase penalties applicable to a conviction on a conspiracy count, and a sharp issue of fact was raised whether a defendant abandoned his criminal membership before effective date of the amendment, and a determination of the issue could not be gleaned from a general jury verdict, court would seek clarification from the jury with respect to the issue by asking the jury to answer special questions after it had decided on a general verdict. • • • since (this) prior membership in the conspiracy is sufficient to support such a verdict. I therefore feel impelled to seek reliable factual guidance for the eventual imposition of sentence. Either the jury by special findings, or I, will have to determine whether or not he continued his membership beyond the effective date of the 1956 amendment. But for me to determine this issue would probably amount to a denial of the defendant's constitutional rights to be tried by jury and to due process of law (citing cases, see note 5 of case, page 275 of 149 F. Supp.). Indeed, it may even be urged that it would be unconstitutional to do so with respect to the defendant who introduced no evidence as to his having disassociated himself from the conspiracy. • • • Thus, departures from the unqualified general verdict are certainly not breaks with tradition. What is sacrosanct, it would seem, is the right of a defendant to have the jury deliberate and apply the law free from judicial trammel. (Citing cases in note 8 and 11 of the case.) Hence, no one has ever questioned the propriety of placing upon the jury the obligation to qualify a verdict of guilty by choosing between life and death sentence, as is done under 18 U.S.C., sec. 1111(b) (murder); 1201 (kidnaping); and 1992 (train wrecking resulting in death) (citing Andres v. U.S., 68 S. Ct. 880, and U.S. v. Poff, 211 F. 2d 171. • • • It has been made clear that the answers to the questions are not bases for the jury's deliberations, nor can they be tests of the propriety of the verdict. Hence, it is hard to understand how the general verdict might be vitiated. • • • I should state in conclusion that I am faced with a situation in which it is my duty to consider sentences under the provisions of a new statute. However, I cannot constitutionally make the factual determination that is a condition precedent to its application. The appropriate arm of the court for this purpose is the jury, and history and common sense authorize it to perform this function. • • •"

The jury answered most of the questions and the sum and substance was that the defendants were guilty of a conspiracy that extended beyond July 19, 1956.

In *Buzzell* v. *U. S.*, 187 F. 2d 878, cert. denied 72 S. Ct. 73, the court cited *Williams* v. *U. S.*, 168 U.S. 382, 389, 18 S. Ct. 92, 94, 42 L. ed. 509, ruling that, "It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment, if the charges made are embraced by some statute in force. * * *. We must look to the indictment itself, and if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute." *U. S.* v. *Hutcheson*, 312 U.S. 219, 229, 61 S. Ct. 463, and *Taylor* v. *U. S.*, 7 Cir. 2 F. 2d 44 were further cited for support, and

"* * * A combination of two or more persons by concerted action to accomplish a purpose either criminal or otherwise unlawful comes within the accepted definition of conspiracy. *U. S.* v. *Hutto*, 256 U.S. 524, 528, 41 S. Ct. 541. It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. *American Tobacco Co.* v. *U. S.*, 328 U.S. 781. * * * The crime is frequently established as a result of the inferences drawn from the acts of the persons accused. *U. S.* v. *Holt*, 7 Cir., 108 F. 2d 365, 368, and *U. S.* v. *Glasser*, 7 Cir. 116 F. 2d 690. * * *."

"*Putting it another way—the* petitioner was *not charged with violations of the Harrison Act or the Jones-Miller Act—those would be substantive violations.* He was *charged under the 14th count with a conspiracy to violate those laws.*" (J.A. 11) and a demand being made to be a witness against himself, and asking him to admit to a previous conviction which if admitted, is to be used as the basis of an enhanced and more severe punishment under the amended specific sections of the narcotic laws (Secs. 7237 of Title 26 and secs. 173 and 174 of Title 21, U.S.C.A., is the equivalent of a violation within the meaning of the fourth amendment.

In the *Bazzell* case, 187 F. 2d 878, *supra*, the defendants contended that the rule of law laid down in *Enfield* v. *U. S.*, 8 Cir., 261 F. 141, was controlling because "where there was special legislation which carried with it a section dealing with conspiracy to commit the crime described in such legislation, that *any* conspiracy action *must* be brought under such section of the statute and not under the General Conspiracy Statute (18-371).

In other words, applying that theory to *Carminati's* case, insofar as prosecution under the Narcotic Control Act of 1956 *or* the Boggs Act, as the Jones-Miller and Harrison Narcotic Acts were known prior to July 19, 1956, Title 18-371 of the Criminal Code was repealed by implication. And, as the defendants made the point in the *Bazzell* case, *supra*, and the prosecution and the courts below likewise made in *Carminati's* case, that because the narcotic acts in effect prior to July 19, 1956 and the Narcotic Control Act effective after July 19, 1956 contained a "built in" conspiracy provision, a conspiracy to commit the crime described in those applicable sections had to be brought under those specific sections and not under sec. 371 of Title 18.

In *Davis* v. *U.S.*, 279 F. 2d 577, the court there states:

> "* * * when Congress enlarged the penalties and prescribed minimum prison terms for narcotic offenses, it issued a command that bound the district courts to impose sentences under sec. 7237 of Title 26 rather than under Title 18 sec. 371 of the U.S. Code, and that if the resulting sentence was so imposed, it was not illegal."

This opinion is contrary to the law as settled in *Bazzell* v. *U.S.*, 187 F. 2d 878, *supra*.

The panel sitting in the *Bazzell* case held that such thinking did not support such a contention for the reason that "that case did not involve an implied repeal of the general conspiracy statute." It related to an express repeal. It further held that Section 371 declares illegal an agreement to commit *any* offense against the United States, and provides, if a felony, that the violator thereof shall be fined no more than ten thousand dollars or imprisoned not more than five years, or both, and that the special statute (and in Carminati's case, secs. 173, 174 of Title 21 and the statutes under 7237 of Title 26, U.S.C.) contained no language tending in the slightest degree to indicate that prosecution under sec. 371 should be excluded, and therefore concluded that the "special" statutes did not impliedly repeal sec. 371 of Title 18—they merely provided an increased penalty where the offense—the object of the conspiracy—was the crime of committing the substantive acts in violation of the applicable statutes.

Masi v. *U.S.*, 223 F. 2d 132, is referred to and relied upon by the courts below for their authority in ruling that as between two statutes, the particular is entitled to preference over the general.

There is but one difference and that the courts below have overlooked in petitioner's case,—that a line of distinction must be drawn as between those types of statutes where a defendant is charged with a conspiracy *to violate* under Title 18—sec. 371, U.S.C. and an indictment that charges a defendant with a conspiracy in violation of Title 21, secs. 173, 174, that is to say, for example, as was declared in *Padilla* v. *U.S.*, 278 F. 2d 188 (5th Cir.):

> "'* * * the defendant herein, unlawfully, wilfully, and knowingly did conspire and agree with * * * a co-conspirator, * * * to fraudulently and knowingly import and bring into the United States a quantity of narcotic drugs, to wit: (cocaine) (heroin), contrary to law, to wit, section 173 of Title 21 U.S. Code; in violation of section 174 of Title 21, U.S.C."

If the indictment in the instant case had been drawn as above, there is no doubt that Carminati would have been fully forewarned as to what he was being charged with, and the present problem would have no place in this Court. (See also *Continental Baking Co. et al.* v. *U.S.*, 281 F. 2d (1960) 137, for proper way of charging a conspiracy *in violation* of the "built-in" conspiracy statute). See *Holt* v. *Comm. of Kentucky*, 284 F. 2d 395 (1960) "• • • The accused was entitled to a jury trial of the charges in the indictment and before a plea of guilty was accepted he should have been fully informed of his rights, the nature of the charge and the penalty to which he would be subjected." [Compare procedure of handing up information after verdict so that defendant could be subjected to second offender sentence.]

In *U. S.* v. *Goldman* (2 Circuit 1941), 118 F. 2d 420, Circuit Judge Chase writing for the Court states in the opening paragraph of the opinion:

"The appellants were indicted in the Southern District of New York for conspiring contrary to the provisions of 18 U.S.C.A. sec. 88 (now Title 18-371) to commit an offense against the United States by (receiving or attempting to obtain money for acting or forbearing to act in a bankruptcy proceeding) in violation of 11 U.S.C.A. sec. 52 sub b."

That is the correct way of interpreting an indictment under 18-371.

In petitioner's case there is little room for complaint by the Government since "the indictment set forth the offense; the indictment was good and sufficient." *U. S.* v. *Rosenblaum*, 7 Cir., 176 2d 329, and *Gaunt* v. *U. S.*, 1 Cir. 184 F. 2d 284.

In the case of *Amendola* v. *U.S. (2nd Cir.)*, 17 F. 2d 529, Judge Learned Hand, speaking for the court said:

> "Even though the evidence justified a submission of the case to the jury, the question was not submitted to them in the colloquial charge of the judge, and we may be sure that they did not take it for themselves. The result is that the defendant was convicted without any determination by the jury as to the character of the transaction, on which his guilt in law depended under the indictment actually found. This was error in any view, and while a majority of us should not, as we have said, have raised it, if the result as a whole had been just, we think the sentence gives the defendant a substantial complaint, even against formal errors.
>
> It is true that the defendant is an old offender; (and could have subjected him to the maximum penalty)—but it did not in our view justify a single offense into two separate offenses by the mere contrivance of charging it in different ways . . . While we recognize, of course, that we have no power over the sentence, yet when the question arises as to whether the record clearly shows that there has been an unjust result, we will not ignore an error, which, except for the sentence, would not have justified a reversal. We cannot assent to the repetition of the charge with purely formal changes, as a device to double the penalty unless the whole trial was conducted with the most scrupulous exactness. Judgment reversed."

To confuse the issue even more, the Seventh Circuit in *U. S.* v. *Beck*, 118 F. 2d 178, ruled that "where one conspiracy was specifically charged, proof of different and disconnected ones would not sustain a conviction."

Yet, in your petitioner's case, Pat Russano, a co-defendant in C-151-226, but tried by another judge, had her conviction set aside by the Second Circuit (257 F. 2d 712) on the ground that the evidence (given in the main by Michael Botto, a paid informer who also testified against Carminati) established *two* conspiracies, one in 1952 and another in 1955-1956, resulting in prejudicial variance from indictment charging a single indictment.

It should be noted that in Pat Russano's case, the first case was under 151-226 and she was charged under count 14, the conspiracy count *to violate* the narcotic laws —the jury disagreed, and the government re-indicted her. In the language of Judge Waterman, C.J.—"* * * she was convicted upon an indictment filed August 14, 1957 which charged * * * the defendant conspired * * * with others * * * *to traffic in narcotics in violation of* 21 U.S.C.A. 173, 174, a change in the form of the indictment charging the very same crime of conspiracy, but this time making sure that the question raised in the instant case would not even see the light of day. For the District Court and the Court of Appeals in the Second Circuit to attempt to read into a law a new interpretation contrary to the Constitution is a novel way of upholding a conviction for conspiracy under Title 18-371.

Your petitioner asks this Court to agree with that decision which denounces a trial court's contrivance of a single charge of conspiracy under 18 U.S.C. sec. 371 into two offenses or two meanings so that that single 18-371 conspiracy can be punished as a conspiracy in violation of Title 21 U.S.C. secs. 173 and 174, instead of the conspiracy under which the petitioner was charged, indicted, tried and convicted. See also *Lindsey et al.* v. *State of Washington*, 301 U.S. 397, 57 S. Ct. 797.

There is a vast difference between statutes that charges one with a crime which is a crime unto itself, separate and distinct from the substantive crime described and which does not arise under the substantive statute at all and another statute, which by the inclusion of the magic words, "or conspires to",—attempts to raise the conspiracy contained in that substantive statute to the level of a substantive crime, by a mere contrivance or conclusion of the trial court when the indictment charging the alleged crime, the evidence, the instructions to the jury, the verdict and conviction all point to a conspiracy to violate the law(s) under 18-371.

To recapitulate,—aside from any further mention of the constitutionality of the Act involved regarding the method of creating and labeling an accused into becoming a second offender, the question of self-incrimination, the method of convicting a defendant of one crime but sentencing for a crime which he has not been indicted, tried or convicted of, and the method of charging a defendant by information for an infamous crime, after trial and conviction, in order to subject him to more severe sentences and punishments,—and the trial court's failure to observe Rule 32 (a) and preserve defendant's rights thereunder,—we now find that:

1. Judge Weinfeld sentenced petitioner to a ten year term of imprisonment under the Narcotics Control Act of 1956 as having conspired in violation of secs. 173 and 174 of Title 21, U.S.C. as amended on July 19, 1956, to violate sec. 174.

2. Judge Levet sentenced David Shackelford, another defendant in Carminati's case and charged with the same crime, to a two year term under sec. 7237(a) of Title 26, U.S.C.A.

3. Judge Palmieri sentenced Michael Botto, a confessed trafficker who had been indicted in two previous cases, but never tried, by virtue of a third indictment, to a two year unsupervised suspended sentence, for the same crime, under Title 18, sec. 371, U.S.C.

4. Judge Palmieri in *Ogull* v. *U.S.* (149 F. Supp. 272) ruled [illegible] where the time factor is of prime importance, he would and did give the jury the task of determining when the conspiracy ended or when the particular defendant withdrew from the crime charged, so that he would be able to know under what statute to sentence the defendant(s), claiming that if he took the task unto himself, he would be violating the defendants' constitutional rights in several respects.

5. In the *Bazzell* case, 187 F. 2d 878, supra, the court there approves of the procedure whereby the defendants can

be and should be tried and sentenced under 18-371, the general conspiracy statute if the defendants have so been charged, since Congress did not expressly repeal Title 18, sec. 371 when the special statutes were enacted into law.

6 In *Amendola* v. *U. S.*, 17 F. 2d 529, Judge Hand recites the reasons why the court there reversed the decision in that case indicating that one cannot justify a single offense into two separate offenses by the mere contrivance of charging it in different ways and thus devise a way to double or make the penalty more severe.

7 The jury in Carminati's case was expressly told that he was not being charged with violating Title 21 secs. 173 and 174; Title 26 secs. 4701, 4703, 4704(a), 4724(c) and 4771(a) but—"These are the laws which the Government charges the defendant conspired to violate • • • (and) This indictment is bottomed upon Section 371 of Title 18 of the United States Code, the conspiracy statute, which makes it an offense if two or more persons conspire to commit any offense against the laws of the United States, and one or more of such persons does any act to effect the object of the conspiracy." (J.A. 10).

Therefore, when Carminati was found "guilty on Count [illegible]—he was found guilty of a single conspiracy,—guilty of violating Title 18—sec. 371 of the U.S. Code—the conspiracy statute,—and no thing else!

"*The conspiracy count against the four defendants* and the three substantive counts against Rich *are in some respects governed by different laws.*

It is almost always characterized by secrecy, rendering detection difficult and requiring much time for its discovery. Because of this, *a conspiracy to commit a crime is made by statute an entirely distinct offense, separate from the substantive crime itself. I shall later discuss the conspiracy and the substantive counts in detail.* (J.A. 9). "

III. Although the Trial Court Instructed the Jury to Determine Defendant's Guilt or Innocence Under "Old" Acts, and Having Obeyed the Instruction, the Jury Was Discharged Without Finding the Defendant Guilty of a Conspiracy in Violation of a Special Narcotic Law, Which Law Was Used as Authority By the Court, to the Defendant's Prejudice in Sentencing the Said Defendant

In the instant case, the court erred when it decided to invade the province of the jury—go behind that verdict,—by which it was bound, and by which Carminati was bound,—and by outright speculation as to what, the jury may have had in mind when it returned the verdict,—state that the evidence adduced upon the trial not only "conclusively proved" a conspiracy to violate the narcotic laws but it left no doubt that the hard core of the conspiracy was to violate section 174 of Title 21. The verdict of the jury must be read "guilty as charged in the indictment"; it cannot be interpreted as anything less." *Williams* v. *U.S.*, 5th Cir., 238 F. 2d 215, 219 (1956) cert. denied 352 U.S. 1024 (1957).

The trial court erred by imposing sentence on the defendant Carminati under Title 21 U.S.C. sec. 174 as amended by the Narcotic Control Act of 1956 rather than imposing sentence as authorized and required under Title 18:371 when the jury was expressly instructed:—

Title 18:371 when the jury was expressly instructed:—

> "• • • with respect to the defendant Carminati, as to whom the principal testimony was given by the witness Oglesby, and it made reference to four different incidents. If at the end of your review of all of the evidence you disbelieve Oglesby's testimony, that is, disbelieve in substance his statements made with respect to the defendant Carminati, then I will instruct you to find the defendant Carminati not guilty." —and all of his testimony consisted of matters relating to events prior to July 19, 1956—

In *Carminati et al. v. U.S.*, 2 Cir. 247 F. 2d 640, the Court of Appeals affirming the judgment of the court below in answer to petitioner's first appeal held,

> "Appellant(s) was convicted upon an indictment charging him with *a conspiracy in violation of 18 U.S.C. 371* to receive, possess, and sell heroin in violation of the federal narcotic laws. 21 U.S.C. 173, 174. 26 U.S.C. secs. 4701, 4703, 4704(a), 4724(a), 4771(a)."

Your Petitioner Anthony Carminati, believes that the decision of the District Court and the Court of Appeals is *res judicata*.

Yet, in *U.S. v. Carminati*, (281 F. 2d 908) petitioner's present appeal Judge Waterman writing for the court ruled that when such question arises " " it would be peculiarly inapposite where no defense has been offered that would rationally permit a verdict of guilty under the statute which imposes the lesser penalty either under 26-7237 (a) U.S.C. or Title 18-371 U.S.C. and that appellant would have the court believe that the jury could have been led to convict on a lesser quantum of evidence because Carminati would receive a lesser penalty under 18-371. "We certainly cannot attribute to the jury such improper conduct." "(Besides)—" " " such a conspiracy; if proven, constitutes in itself a violation of Title 21, sec. 174 U.S.C."

The panel's statement "apparently appellant(s) would

The panel's statement "apparently appellant(s) would have us believe that the jury could have been led to convict or a lesser quantum of evidence because appellant(s) would receive lesser penalties under 18 U.S.C. 371. We certainly cannot attribute to the jury any such improper conduct." is made without reason in the case, because it is clear that somewhere along the line the Appeals Court failed to read the brief or appendix to the brief filed by Carminati.

But see in re *U. S. v. Ogull, supra*, and the case of *Boyd v. U. S.*, 116 U.S. 616, 8 S. Ct. 524, on right of defendant to remain silent

He made no such statement! His argument was that since the trial court instructed the jury as it did, it had eliminated the question of guilt after July 19, 1956 and that if any guilt was established the sentence would have to reflect the law as it was prior to July 19, 1956, and that if 21-174 was applied for punishment purposes, the minimum sentence was *not* ten years, but only five, and under the indictment and evidence, the jury brought in a verdict under 18-371. And farther, if the court still insisted that the new Narcotics law controlled the sentence, since it had by his instructions eliminated any punishment under 21-174 (because the element of importation, illegally and knowingly, etc.) had not been proven, that the only sentence under the new act available to the court was either 18-371 or under 7237(a) with the minimum under that section being five years for a second offender, despite the further fact that Carminati resisted being called and designated a second offender on the basis of the indictment and the patent unconstitutionality of the statute involved wherein he was being labeled without being charged as required under the constitution and the Fed. Rules of Cr. P. (*U. S. v. Berkowitz*, 45 F. Supp. 564).*

The opinions in *Shelton* v. *U. S.*, 235 F. 2d 951, 954 (4th Cir., 1956), and *Rosenberg* v. *U. S.*, 346 U.S. 273, 303 (dissenting opinion of Frankfurter, J.), indicate that "the basis on which a jury convicts is authoritatively to be taken from what the judge tells the jury"—and "it cannot be said beyond a reasonable doubt what were the precise charges the jury had in mind in announcing its conclusions."

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* * * * * In view of the foregoing authorities, and in the absence of contrary rulings, it should be held that under the (section involved) an imprisonment penalty cannot be imposed except in those cases where a second offense has not only been committed, but where the indictment or information charges the fact.

In *U. S.* v. *McElvain, et al.*, 272 U.S. 633, 47 S. Ct. 219, this Court held that "the crime of conspiracy to commit an offense is distinct from the crime itself," and in that case, which dealt with Internal Revenue statutes in particular, the opinion read: "The offense charged is a conspiracy and not arising under the internal revenue laws."

In *Hirsch* v. *U. S.*, 100 U.S. 33, *supra*, it was decided that an offense punishable under what is now 18-371, the conspiracy statute, that it is not a crime arising under the revenue (or narcotic?) laws, although the overt act necessary to be alleged affects the revenue of the United States. (See Legislative history report, regarding Narcotic Control Act of 1956, H.R. 11619, P. 11a appendix hereto, **"The Department of the Treasury is the principal Federal agency with responsibility for the enforcement of these (narcotic) laws. This responsibility arises from the fact that the Federal narcotic laws are revenue measures. * * *"**

The petitioner does not know how to make his plea for relief any stronger except to tell this Court that he does not seek a new trial or a redetermination of the facts. He does not now challenge the validity of the jury verdict of conviction or that the indictment in his case charged him with anything else but a conspiracy under 18-371. His position is simply that the only offense put to the jury, and by the instructions given, he was convicted of a conspiracy *to violate* under 18-371, five sections of Title 26 and two sections of Title 21 of the U.S.C. and the available sentences were not applied. The validity of his claim can be ascertained from an examination of his trial record without the necessity of any further factual inquiry outside the record. Cf. *Ladner* v. *U. S.*, 358 U.S. 169.

For this reason Carminati challenges the validity of the attempted connection between his case and the cited cases by the lower courts in their desire to continue to deny him his freedom.

IV. The Statute Under Which Defendant Was Sentenced Is Unconstitutional, Vague, Indefinite and Violates the V and VI Amendments and the Applicable Fed. Rules of Cr. Pro.

The proceedings outlined in the amended Narcotics Control Act for the presentation of an information to the sentencing court is made a foundation for increasing the punishment by judgment of the court without an indictment as required under the 5th amendment to the Const. of the U. S. and that is an action removing the cloak of protection which the constitution intended, and is an act prohibited under the aforesaid amendment.

Now, because, as your petitioner contends, Congress has written a vague, indefinite, incoherent law calling for two different punishments for a conspiracy to violate different sections of an act, if the sentencing judge chooses to apply different standards, and has included in that act a procedure that violates the Fifth Amendment to the Constitution by authorizing the court to deviate from the procedure demanded under Rules 7 and 8 of the F.R. of Cr. P. and the V and VI amendments to the Constitution, the various circuit and district courts all over the United States have contributed to the confusion that exists in this field of law and if there ever was a question that had to be settled once and for all, this is it.

The indictment did not charge Anthony Carminati with being a second offender under any of the Narcotic laws nor was he convicted as a second offender under the Narcotic laws,—yet Congress, in its desire to wipe out a nefarious business, in its zeal to protect the public, has enacted legislation that circumvents a Constitutional requirement by creating a method of conviction on a charge never made in the indictment and on a charge that the defendant has never been tried or convicted of and in a manner that does not give notice to or allow the defendant to prepare a proper defense as provided for under the V Amendment and Rules 7 & 8 of the Fed. R. of Cr. P.

Your petitioner does not argue with the aims or powers of Congress to control Commerce or pursue methods and means to enact into law methods that change procedures in the legal process but when it tampers with the rights of a defendant guaranteed him by the Bill of Rights and enacts a short cut abrogating the requirement that a felony be prosecuted in any other way than by an indictment found by a grand jury plus the other attendant steps to insure him a fair trial and due process, that resulting statute is illegal, unconstitutional and void.

The illegal sentence imposed on the defendant was not authorized by the common law record in the case, if we but examine the indictment, the plea, the verdict and the sentence. *U.S.* v. *Mauer*, 235 U.S. 55.

No error is claimed in the instructions given to the jury; reference is made merely to throw light on what offense the petitioner was tried for and convicted of. The sentence was *not* authorized. *U.S.* v. *Morgan*, 346 U.S. 502, *U.S.* v. *Bradford*, 194 F. 2d 197 (2 Cir.); *Cook* v. *U.S.*, 171 F. 2d 567 (C.A. 1); *Duggins* v. *U.S.*, 240 F. 2d 479 (C.A. 6); *Foushee* v. *U.S.*, 203 F. 2d 247 (C.A. 5).

Petitioner has been, or rather was under the impression, until re-reading the opinion of August 22, 1960, pertaining to his search for justice, that he was presumed to be innocent until proven guilty beyond every reasonable doubt and that he had a constitutional right not to be forced to testify against himself in order to prove his innocence. But, whose reasoning under law is correct or proper under the facts presented in your petitioner's case!

In the opinion in *Carminali's* case, the court refuses to recognize the fact that an accused is presumed to be innocent at every stage of the trial until he has been proven guilty beyond a reasonable doubt. Instead, the court insists that "it is peculiarly inapposite where no defense has been offered that would rationally permit a verdict of guilty under the statute which imposes the lesser penalty (here either under 27 sec. 7237(a) *or 18, sec. 371*)."

But see J. Palmieri's view on right of defendant to remain silent (footnote in re *U. S.* v. *Ogull*, *supra*, and the following case of *Boyd* v. *U. S.*, 116 U.S. 616, 8 S. Ct. 524, 532, where this Court said:

> "* * * It is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust. * * * the information is in substance and effect a criminal one. A, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law (as provided for in Title 21 sec. 173) are of this quasi criminal nature, we think that they (the informations filed) are within the reason for all the purposes of the fourth amendment and that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself, and a demand being made upon him to admit to a previous conviction which if admitted, is to be used as the basis of an enhanced and more severe punishment under the amended specific sections of the narcotic laws (Secs. 7237 of Title 26 and secs. 173 and 174 of Title 21, U.S.C.A., is the equivalent of a violation within the meaning of the [illegible] is divested of many of the aggravating incidents, yet it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.

It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.

We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law.

There have been several decisions in the circuit and district courts sustaining the constitutionality of the law under consideration, (but) * * * It seems to us that these considerations fail to meet the most serious objections to the validity of the law. * * * We find nothing in the decisions to change our views in relation to the principal question at issue. **We think the law that authorized the procedure, is unconstitutional and void, and the admission in evidence of the information, was error and an unconstitutional proceedings.**

If the trial court has attempted, after more than three years to justify the imposition of the sentence under the 'new' statute based on the overt act of August 22, 1956, an incident discarded by both the court and the prosecution (see J.A. p. 16) then the law so construed and applied goes beyond the power to restrict abuses of freedom of speech and assembly and arbitrarily denies that freedom and the Fifth Amendment. *Herndon* v. *Lowry*, 57 S. Ct. 732, reversing *Lowry* v. *Herndon*, 186 S.E. 429, 182 Ga. 589.

See also *Lindsey et al.* v. *State of Washington*, 301 U.S. 397, 57 S. Ct. 797, in re application of ex post facto laws compared to and likened to the procedure and sentence imposed in Carminati case, which decided that:

> "It is plainly to the substantial disadvantage of petitioner to be deprived of an opportunity to receive a sentence which would give him freedom from custody and control prior to the expiration of the ten year term, a sentence which was the maximum under the old statute but now the minimum under one section of the new statute, plus the further disadvantage of being deprived of the benefits available under the parole provisions of the old statute." See also unanimous opinion of *Cole et al.* v. *State of Arkansas*, 333 U.S. 196, 68 S. Ct. 514, regarding conviction on a charge not indicted for or charged.

In *Ladner* v. *U.S.*, 79 S. Ct. 209, 358 U.S. 169, Justice Brennan speaking for the Court stated:

"when Congress has not explicitly stated what the unit of the offense is, the doubt will be judicially resolved in favor of lenity."

> "When choice has to be made between two readings of what Congress has made a crime, it is appropriate before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definitive. We should not derive criminal outlawry from some ambiguous implication. (cases cited.) * * * And in *Bell* v. *U.S.*, the Court expressed its policy as follows:
>
> > "When Congress leaves to the Judiciary the task to imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. (cases cited.) This policy of lenity means that this Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended. If Congress desires to create multiple offenses from a single act * * * Congress can make that meaning clear. * * * "

In *Gore* v. *U.S.*, 357 U.S. 386, *supra*, one of the cases cited in the *Ladner* case, it was said:

> "* * * It seems more daring than convincing to suggest that three different enactments, each relating to a separate way of closing in on illicit distribution of narcotics, each passed at three different periods, for each of which a separate punishment was declared by Congress, * * * that the defendant should be treated as though he committed only one of those offenses. This situation is different from the one that led to the decision of the Court in *Bell* v. *U.S.*, 75 S. Ct. 620."

In light of the statute (Narcotic Control Act of 1956) as it appears on the books now and in light of the previous statutes and the legislative history attached thereto, your petitioner claims that the doubt in his case was judicially resolved in favor of SEVERITY.

"In a case where a party is proceeded against for a second or third offense under the statute, and the sentence prescribed is different from the first by reason of its being a second or third offense, the fact thus relied on must be averred in the indictment. * * * But such averment does not charge an offense. * * * It is only the averment of a fact which will effect the punishment. The jury does not find the person guilty of the previous offense; they only find that he was previously convicted of it, as an historical fact. *Jacobs* v. *U.S.*, 24 F. 2d 890, 58 App. D.C. 62; see also *Jordan* v. *U.S. District Court for the District of Columbia*, 233 F. 2d. 362, 98 App. D.C. 160,—" * * * "On the other hand, where the aggravation arises from the manner in which the crime was committed, in substance a different aspect of the offense is sought to be punished. Accordingly, we think,—as did the Fifth Circuit in the *Meiers* case—that the facts in aggravation must be charged in the indictment must be charged in the indictment and found to be true by the jury." See also *In re Oliver*, 68 S. Ct. 499, 333 U.S. 257,—failure to afford petitioner reasonable opportunity to defend himself against a charge made by an officer of the court from records, was held to be a denial of due process. In *Chambers* v. *Florida*, 309 U.S. 227, 60 S. Ct. 472, 84 L. ed. 716,—"It is the law of the land that no man's life, liberty or property be forfeited as a punishment until there has been a charge *fairly* made and *fairly* tried in a public tribunal."

> "Even Congress, in the choice of means to effect a permissible regulation of commerce, must conform to 'due process.'" *Virginia Railway Company* v. *System Fed. #40*, 300 U.S. 515, 57 S. Ct. 592.

In the interest of justice, since the waters of justice have been polluted here and because this is a federal criminal case and because this Court has supervisory jurisdiction over the proceedings of the federal courts, "it is the duty of the Supreme Court to eliminate that pollution and remedy the situation at the earliest opportunity." *Mesarosh* v. *U. S.*, 352 U.S. 1, 77 S. Ct., 8.

In view of the confusion in the imposition of sentences on the various co-defendants under the various statutes, although indicted for the same offense, and in view of the divergent opinions held by the different district and courts of appeals in the circuits all over the country, in the interest of justice and consistent with the strict requirements of certainty and fairness in sentencing, a principle that has the approval of this Court, the cause ought to be returned to the district court with orders to resentence under the least severe statute, (either under Title 18-371, U.S.C.A. or under the statutes in effect prior to July 19, 1956.) *Townsend* v. *Burke*, 334 U.S. 736; *Nilva* v. *U.S.*, 352 U.S. 385; *Husty* v. *U.S.*, 282 U.S. 694.

Your petitioner Anthony Carminati believes and asks this Court to decide that a defendant should not be "constr ed" into jail, and claims that the Congressional intent as expounded in the Narcotic Control Act of 1956 and all the previous acts and statutes thereunder, the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, have construed, and your petitioner says incorrectly, as far as his case is concerned, the length, type and severity of a sentence to be imposed under an improp-

and severity of a sentence to be imposed under an improp-erly interpreted law.

"Has the price of liberty become so depressed and cheap that the courts which impose sentences are able to arrive at a decision by speculation?"

If that is so—then a new doctrine has been born—that a defendant can be "construed" into jail!

But, if our country is still guided, led and protected by the Constitution of the United States as interpreted by the Supreme Court, then he knows that justice will be done in his case.

CONCLUSION

Your petitioner has attempted to describe the errors committed by the trial court and compounded by the adamant affirmance of those errors by the Court of Appeals and believes that any one of those errors listed and discussed is sufficient in itself to warrant reversal of the conviction or the sentence in his case.

To repeat that "fundamental principles of liberty and justice have been disregarded" in the case of *U. S. v. Carminati* would perhaps, to this Court, seem trite and a phrase oft repeated at the close of a petition for a writ of certiorari, but it is comforting to know that the Supreme Court of the United States has never hesitated to exercise its jurisdiction and power to enforce the guaranty of Constitutional rights and to make "due process of law" and "equal justice under law" more than just a phrase in the Constitution and carved words on its home.

For all of the foregoing reasons set forth in the argument presented, Anthony Carminati is left to the mercy of the Supreme Court which has the power to strike down a conviction so full of violations of his constitutional rights, and is joined by his counsel who respectfully prays that this petition for certiorari be granted.

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APPENDIX

RULES, STATUTES, CONSTITUTIONAL PROVISIONS INVOLVED AND CONGRESSIONAL LEGISLATIVE HISTORY

Federal Rules of Criminal Procedure.

RULE 7. THE INDICTMENT AND THE INFORMATION.

(a) Use of Indictment or Information. * * * An offense which may be punished by imprisonment for a term exceeding one year * * * shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information.

(b) Waiver of Indictment. An offense which may be punished by imprisonment for a term exceeding one year * * * may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

(c) Nature and Contents. The indictment * * * shall be a plain, concise and definite written statement of the essential facts constituting the offense charged * * * error in the citation * * * does not vitiate the indictment unless the error * * * has misled the defendant to his prejudice.

RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS.

(a) Two or more offenses may be charged in the same indictment * * * in a separate count for each offense if the offenses charged * * * are of the same or similar character based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan;

RULE 23. TRIAL BY JURY OR BY THE COURT.

(a) Trial By Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

RULE 32. SENTENCE AND JUDGMENT.

(a) Sentence. * * * Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

RULE 35. CORRECTION OR REDUCTION OF SENTENCE.

The court may correct an illegal sentence at any time. * * *.

RULE 52. HARMLESS ERROR AND PLAIN ERROR.

(b) Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Title 26, secs. 7237 U. S. Code.

P. L. 728, 84th Cong., 2d Sess., § 103:

Prior to amendment of 7 19 56—7237 read as follows:

"(a) Violation of Law Relating to Opium and Coca Leaves and Marihuana.—Whoever commits an offense or conspires to commit an offense described in Part I, or Part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than 10 or more than 20 years. *Upon conviction for a*

second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subsection, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subsection or in section 2(c) of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C. 174). P. L.-1, 84th Cong., 1st Session, effective 1/20/55.

Sec. 7237 and 7237(a) as it pertains to National Narcotic Control Act:

[Sec. 7237]

Sec. 7237. Violation of Laws Relating to Narcotic Drugs and to Marihuana.

[Sec. 7237(a)]

(a) Where No Specific Penalty Is Otherwise Provided. —Whoever commits an offense, or conspires to commit an offense, described in Part I or Part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be imprisoned not less than 2 or more than 10 years and, in addition, may be fined not more than $20,000. For a second offense, the offender shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a third or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

Source as originally enacted in 1954 Code: Sec. 2557(b)(1), 1939 Code, substantially unchanged.

Amendments:	Sec. as amended effective
P. L. 728 84th Cong., 2nd Sess., § 103	7-19-56

[Sec. 7237(c)]

(c) CONVICTION OF SECOND OR SUBSEQUENT OFFENSE.—

(1) PRIOR OFFENSES COUNTED.—For purposes of subsections (a), (b), and (d) of this section, subsections (c) and (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), and the Act of July 11, 1941, as amended (21 U.S.C., sec. 174), and the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a), an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which was provided in subsection (a) or (b) of this section or in—

(A) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act (21 U.S.C., sec. 174);

(B) the Act of July 11, 1941 (21 U.S.C., sec. 184a);

(C) section 9 of the Act of December 17, 1914 (38 Stat. 789);

(D) section 1 of the Act of May 26, 1922 (42 Stat. 596);

(E) section 12 of the Marihuana Tax Act of 1937 (50 Stat. 556); or

(F) section 2557(b)(1) or 2596 of the Internal Revenue Code of 1939.

For purposes of determining prior offenses under the preceding sentence, a reference to any subsection, section, or Act providing a penalty for an offense shall be considered as a reference to such subsection, section, or Act as in effect (as originally enacted or as amended, as the case may be) with respect to the offense for which the offender previously has been convicted.

* * * * *

[Sec. 7237(d)]

(d) NO SUSPENSION OF SENTENCE; NO PROBATION; ETC.—Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense,

the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4802 of title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D. C. Code 24-201 and following), as amended, shall not apply.

Amendments:	Sec. as amended effective
P.L. 728, 84th Cong., 2d Sess., § 401	7-19-56

P. L. 728, 84th Cong., 2d Sess., § 403:

Added Sec. 7237(d) to read as above.

Effective under § 401, 7-19-56.

ARTICLE V—(FIFTH AMENDMENT) to the fifth article of the original Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; * * *.

ARTICLE VI—(SIXTH AMENDMENT); same as above:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; * * *.

ARTICLE VIII—(EIGHTH AMENDMENT); same as above:

* * * Excessive bail shall not be required, not excessive fines imposed, nor cruel and unsual punishments inflicted.

ARTICLE IX—(NINTH AMENDMENT); same as above:

The enumerations in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

(* * * nor deny to any person the equal protection of the laws?)

TITLE 18, Section 371, U.S.C.A.

If two or more persons conspire either to commit any offense against the United States or defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *.

TITLE 21, Section 174, U.S.C.A.

The text of this section as it appeared in the statute books before and after 7-19-56 is reproduced in the appendix on pp. 16a and 17a.

The important part as it relates to Carminati has been emphasized by printing those words connected therewith in bold face type.

HOUSE OF REPRESENTATIVES
84th Congress, 2d Session

Report No. 2388

NARCOTIC CONTROL ACT OF 1956

REPORT

[To accompany H. R. 11619]

The Committee on Ways and Means, to whom was referred the bill (H. R. 11619) to amend the Internal Revenue Code of 1954 and the Narcotic Drugs Import and Export Act to provide for a more effective control of narcotic drugs and marihuana, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

I. Purpose

Your committee's bill, H. R. 11619, would amend the provisions of the Internal Revenue Code of 1954 and of certain other Federal statutes relating to the control of narcotic drugs and marihuana so as to provide more effective means for the eradication of the illicit trafficking in these drugs and for the elimination of the illegal uses of these drugs.

Your committee is unanimous in urging the enactment of H. R. 11619.

II. General Statement

A. *Principal Features of H. R. 11619*

* * * * * * *

3. *Penalty provisions.*—The penalty provisions of the Internal Revenue Code of 1954 applicable to narcotic drugs and marihuana would be amended so as to increase the

mandatory minimum sentence in the case of the trafficker and increase the permissive maximum sentence in the case of both the possessor and the trafficker. At the present time all first offenders are subject to a minimum mandatory sentence of 2 years and a permissive maximum of 5 years; all second offenders, 5 to 10 years; and all third and subsequent offenders, 10 to 20 years. For the trafficker, the penalties would be made a mandatory minimum of 5 years for the first offense and a permissive maximum of 20 years; and for second and subsequent offenses the mandatory minimum would be 10 years with a permissive maximum of 40 years. * * * There would be a prohibition on the granting of probation, suspension of sentence, or parole with respect to any of the increased penalties applicable to traffickers. * * *

* * * * * * * * * * *

B. Description of H. R. 11619

1. *Short title.*—Section 1 of your committee's bill would provide a short title for H. R. 11619 so that it could be cited as the "Narcotic Control Act of 1956."

* * * * * * * * * * *

Section 3 of your committee's bill adopts the language style of a similar section in the Harrison Narcotic Act, section 4724(b) of the Internal Revenue Code of 1954, so as to clarify the scope of the prohibition. The section does not apply to persons who shall have registered and paid the required special tax, nor to employees of such persons while acting in the scope of their employment, to common carriers, to persons who have lawfully secured marihuana, or to officers engaged in the enforcement of Federal or State laws relating to marihuana.

4. *Penalties.*—Section 4 of H. R. 11619 would amend the penalty provisions of the Internal Revenue Code of 1954 relating to narcotic drugs and marihuana. Penalties (unless otherwise stated) that would be provided by the section are:

First offense—a discretionary fine of not more than $20,000 and imprisonment for not less than 2 years nor more than 10 years.

Second offense—a discretionary fine of not more than $20,000 and imprisonment for not less than 5 years nor more than 20 years.

Third or subsequent offense—a discretionary fine of not more than $20,000 and imprisonment for not less than 10 years nor more than 40 years.

The above penalties would be applicable to persons in illegal possession.

No probation, suspension of sentence, or parole would be granted to a second or subsequent offender. * * *

* * * * * * * * * * *

Subsection (c) of the proposed section 7237 would specify the offenses which shall be considered and counted as previous offenses in order to determine if a person is a second or subsequent offender. Present law provides a procedure to be followed in proving a second or subsequent offense after conviction in all cases for which increased penalties are provided. **Your committee's bill would clarify the offenses that constitute prior convictions for purposes of the act.**

* * * * * * * * * * *

7. *Penalties for violating the Narcotic Drugs Import and Export Act.*—Section 7 would amend section 2(c) of the Narcotic Drug Import and Export Act, as amended (21 U.S.C. 174), by increasing the penalties for violation of that statute. The present first offense penalty would be increased from a minimum 2 years and a maximum 5 years imprisonment to a minimum of 5 years and a maximum of 20 years. A second or subsequent offender would be subject to a minimum imprisonment of not less than 10 years and a maximum imprisonment of not more than 40 years. A discretionary fine of not more than $20,000 would be al-

lowed for a first or subsequent offense. Under the present law a second offender is subject to imprisonment of not less than 5 nor more than 10 years and a third or subsequent offender is subject to imprisonment for not less than 10 nor more than 20 years. At present a mandatory fine of not more than $2,000 applies to all offenses. Under the present law probation and suspended sentence are available for first offenders and parole is available to all offenders. The proposed amendment contained in your committee's bill would provide that probation, suspension of sentence, and parole would not be available to any offender. * * *

* * * * * * * * * * *

C. Need for the Legislation

* * * * * * * * * * *

2. *Legislation and enforcement.*—During the 19th century and the early years of the 20th century there was little governmental control over the use of narcotic drugs within the United States. At the present time the manufacture, importation, distribution, and use of narcotic drugs are subject to Federal, State, and local control and regulation. The basic statute providing Federal controls is the Harrison Narcotic Act, enacted in 1914, and subsequently made a part of the Internal Revenue Code. The other two principal Federal statutes which specifically control narcotic drugs and marihuana are the Narcotic Drugs Import and Export Act and the Marihuana Tax Act. The Harrison Narcotic Act provides the machinery through which the Federal Bureau of Narcotics is able to exercise control over the distribution of narcotic drugs within the country. The Narcotic Drugs Import and Export Act allows the Commissioner of Narcotics to control the importation of opium and coca leaves and the exportation of manufactured narcotic drugs and preparations. It prohibits the importation of opium prepared for smoking purposes. It also prohibits the importation of opium for the manufacture of heroin. The Marihuana Tax Act, by requiring the registration and

payment of tax, controls the traffic in marihuana. In addition, the United States smuggling law is applicable to the illegal entries of drugs. Your committee's bill would make the smuggling of marihuana a specific offense under the Narcotic Drugs Import and Export Act.

The Department of the Treasury is the principal Federal agency with responsibility for the enforcement of these laws. This responsibility arises from the fact that the Federal narcotic laws are revenue measures. There are two bureaus within the Department of the Treasury involved in narcotic law enforcement. The Bureau of Narcotics, established in 1930, in the Department of the Treasury, is responsible for regulating, supervising, and controlling the importation and manufacture of narcotics for legal uses and the registration of those persons concerned with such uses. In addition the Bureau of Narcotics is responsible for the apprehension of those found to be violators of the narcotic laws. The Bureau of Customs in the Department of the Treasury is responsible for the prevention of smuggling and cooperates with the Federal Bureau of Narcotics in combating the illicit narcotic traffic.

* * * * * * * * * * *

3. *Penalties.*— * * * It is the view of your committee that the imposition of heavier penalties is the strongest and most effective deterrent to narcotic addiction and illicit drug traffic.

The enactment of Public Law 255 of the 82d Congress, the so-called Boggs law, in 1951, has been largely responsible for turning the rising tide of the illicit narcotic and marihuana traffic and addiction. The Boggs' law for the first time imposed minimum mandatory sentences for violations of the narcotic and marihuana laws. It provides a penalty of not less than 2 years nor more than 5 years for a first offense; not less than 5 years nor more than 10 years for a second offense; and for a third or subsequent offense, not less than 10 years nor more than 20 years. It also pre-

scribes a mandatory fine of not to exceed $2,000. For second or subsequent offenses it prohibits probation or suspension of sentence. * * *

In evaluating the effectiveness of the presently prescribed penalties, it must be recognized that special incentives in our penal system serve to decrease the actual time spent in a penal institution under a sentence imposed by a court. The violator is eligible for parole after serving one-third of his sentence. As is true of all Federal violators, he is eligible for conditional release after serving two-thirds of his sentence. * * * This mitigation of sentence tends to defeat the purposes of Public Law 255 and in the view of your committee should be corrected by the establishment of more severe mandatory minimum sentences and permissive maximum sentences as provided in H. R. 11619. * * *

* * * * * * * * * * *

It is the view of your committee that the illicit drug trafficker, whether he be a first offender or an offender with previous convictions, must be severely punished. The illicit traffic can only be eradicated by the establishment of laws by the Congress that will enable enforcement officials to effectively and vigilantly work to apprehend the trafficker and that will enable the courts to justly impose sentences that are commensurate with the horrendous nature of the offense involved.

* * * * * * * * * * *

III. Conclusion

Experience with the Boggs law, Public Law 255 of the 82d Congress, since its enactment on November 2, 1951, has clearly demonstrated the efficacy of severe punishment in reducing the illicit commerce in drugs. It is the view of your committee that the passage of H. R. 11619 will provide our Federal enforcement officials and the Federal judiciary with the means to bring about a sharp reduction and perhaps the elimination of the illicit drug traffic in the United States. The compelling need for success in this

endeavor and the danger to our society of failure to achieve that success warrant prompt action by the Congress. Accordingly, your committee is unanimous in urging favorable action on H. R. 11619.

IV. Changes in Existing Law

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as introduced, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

INTERNAL REVENUE CODE OF 1954

* * * * * * * * * * *

[SEC. 7237. VIOLATION OF LAWS RELATING TO NARCOTIC DRUGS AND TO MARIHUANA.

* * * * * * * * * * *

SEC. 7237. Violation of Laws Relating to Narcotic Drugs and to Marihuana.

(a) Where No Specific Penalty Is Otherwise Provided.—Whoever commits an offense, or conspires to commit an offense, described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be imprisoned not less than 2 or more than 10 years and, in addition, may be fined not more than $20,000. For a second offense, the offender shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a third or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

(b) Sale or Other Transfer Without Written Order.—Whoever commits an offense, or conspires to commit an offense, described in section 4705 (a) or section 4742 (a) shall be imprisoned not less than 5 or more than 20 years

and, in addition, may be fined not more than $20,000. For a second or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000. If the offender attained the age of 18 before the offense and—

(1) the offense consisted of the sale, barter, exchange, giving away, or transfer of any narcotic drug or marihuana to a person who had not attained the age of 18 at the time of such offense, or

(2) the offense consisted of a conspiracy to commit an offense described in paragraph (1),

the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

(c) Conviction of Second or Subsequent Offense.—

(1) Prior offenses counted.—for purposes of subsections (a), (b), and (d) of this section, subsections (c) and (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., sec. 174), and the Act of July 11, 1941, as amended (21 U. S. C., sec. 184a), an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which was provided in subsection (a) or (b) of this section or in—

(A) subsection (c) or (h) of section 2 of the Narcotic Drugs Import and Export Act (21 U. S. C. sec. 174);

* * * * * * * * * *

For purposes of determining prior offenses under the preceding sentence, a reference to any subsection, section, or Act providing a penalty for an offense shall be considered as a reference to such subsection, section, or Act as in effect (as originally enacted or as amended.

as the case may be) with respect to the offense for which the offender previously has been convicted.

(2) Procedure.—After conviction (but before pronouncement of sentence) of any offense the penalty for which is provided in subsection (a) or (b) of this section, subsection (c) or (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in subsection (a) or (b) of this section, subsection (c) or (h) of such section 2, or such Act of July 11, 1941, as amended, as the case may be.

(d) No Suspension of Sentence; No Probation; Etc.—Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c) or (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense,

the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D. C. Code 24-201 and following), as amended, shall not apply.

* * * * * * * * * * * *

SECTION 2 OF THE NARCOTIC DRUGS IMPORT AND EXPORT ACT, AS AMENDED (before 7/19/56)

SEC. 2. (a) * * *

* * * * * * * * * * * *

[(c) Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two ~~or more than five years~~. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. **Upon conviction for a second or subsequent offense,** the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557 (b) (1) of the Internal Revenue Code, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended;

section 1, chapter 202 of the Act of May 26, 1922 (42 Stat. 596), as amended; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557 (b) (1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subdivision.

[Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.]

(After 7/19/56)

(c) Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. **For**

a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), *the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.*

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237 (d) of the Internal Revenue Code of 1954.

* * * * * * * * * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 377—October Term, 1959.

(Argued June 16, 1960 Decided August 22, 1960.)

Docket No. 26273

UNITED STATES OF AMERICA, *Appellee*,

v.

MICHAEL GALGANO, *Appellant*.

UNITED STATES OF AMERICA, *Appellee*,

v.

ANTHONY CARMINATI, *Appellant*.

Before:

WATERMAN, MOORE and HAMLIN,*

Circuit Judges.

Appeals from orders of the United States District Court for the Southern District of New York, Weinfeld, *J.*, deny-

ing appellants' motions for correction of sentence under 28 U. S. C. § 2255. Affirmed.

S. Hazard Gillespie, Jr., United States Attorney for the Southern District of New York (Gerald Walpin, George I. Gordon, Asst. United States Attorneys, of counsel), *for Appellee.*

Dodd, Cardiello & Blair, New York City, *for Galgano.*

I. William Stempil, Washington, D. C. (William Weintraub, Brooklyn, N. Y., of counsel), *for Carminati.*

Waterman, *Circuit Judge*:

On November 19, 1956 appellants Michael Galgano and Anthony Carminati were charged in Count 14 of a fourteen count indictment with having conspired with other named persons to violate certain specified sections of the federal narcotics laws. Omitting the twenty-three overt acts appended to the count, Count 14 is set forth in its entirety in the footnote.[1]

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* Of the Ninth Circuit, sitting by designation.

[1] FOURTEENTH COUNT

1. Commencing on or about the 1st day of January, 1951 and continuously thereafter up to and including the day of the filing of this indictment, in the Southern District of New York, Salvatore Russano, Ralph Russano, Anthony Carminati, William McKenney, Jr., Frank Rich, Robert Guippone, Joseph Ambrosini, Carlos Ruiz, Mary Lou Brolet Russano, Sebastian Della Universita, Michael Botto, Michael Galgano, David Shackelford, Donald Bauer and Ada Volkell, the defendants, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together with John Sciarra, David Oglesby, Irwin Greenspun, Vicki Cratty, Freddie Cratty, Abraham Schwartz, Carrenza M. Howard, Daniel Murphy and "John Doe" also known as Wilson, white male, blond hair, 30-35 years of age, approxi

After trial before Judge Weinfeld and a jury appellants on January 14, 1957 were found guilty. On February 5,

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mately 5'11" tall and 180 pounds weight, named herein as co-conspirators, but not defendants, and with others to the grand jury unknown to violate the United States Code, Title 26, Sections 4704(a), 4701, 4703, 4724(c) and 4771(a), and Title 21, Sections 173 and 174.

2. It was part of the said conspiracy that the said defendants unlawfully, wilfully and knowingly would sell, dispense and distribute a quantity of narcotic drugs, the exact amount and nature thereof being to the grand jury unknown, in that the said narcotic drugs would not be in the original stamped package or from the original stamped package, that is to say, that there would not be affixed to the container in and from which the said defendants would sell, dispense and distribute the narcotic drugs as aforesaid any United States Internal Revenue Stamps as required by Section 4703, of Title 26, United States Code in violation of Sections 4701, 4703, 4704(a) and 4771(a) of Title 26, United States Code.

3. It was further a part of said conspiracy that the said defendants, being persons who had not registered and who had not paid the special tax provided for by Sections 4702(a), 4721 and 4722 of Title 26, United States Code, unlawfully, wilfully, and knowingly would have in their possession and under their control a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, in violation of Section 4724(c) of Title 26, United States Code.

4. It was further a part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, sell and facilitate the transportation, concealment and sale of the aforesaid narcotic drugs, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

• • • • •

(Title 18, United States Code, Section 371).

s/ Paul W. Williams
PAUL W. WILLIAMS
United States Attorney

s/ John G. Winchester
Foreman

1957 Galgano was sentenced to a term of ten years imprisonment as a second offender under 21 U. S. C. § 174.[2] Carminati's sentencing was adjourned for nine days and on February 14 a similar ten year sentence was imposed upon him. The convictions were affirmed by this court, *sub nom. United States* v. *Carminati*, 247 F. 2d 640 (2 Cir. 1957), and certiorari was denied, 355 U. S. 883.

Thereafter appellants each moved under 28 U. S. C. § 2255 for corrections of sentence. Galgano's motion was denied on September 2, 1959, reported *sub nom. United States* v. *McKenney*, 181 F. Supp. 143; Carminati's on February 18, 1960. Each contends that he should not have been sentenced under 21 U. S. C. § 174, but instead was required to be sentenced under 18 U. S. C. § 371, the general conspiracy statute, which provides for a five year maximum sentence. In addition, as an independent ground, Carminati contends that he should be sentenced anew because the sentencing judge failed to afford him the "right of allocution" provided for in Rule 32(a) of the Federal Rules of Criminal Procedure.

Appellants' contention relative to 18 U. S. C. § 371 rests upon the parenthetical citation of that section at the end of Count 14. (See footnote 1, *supra*.) We reject appellants' argument that this citation precluded conviction under any other section. It is clear that when an indictment charges conduct which is violative of a particular statute

[2] The writer of the present opinion points out that this is contrary to the opening statement made by him in the prior opinion of affirmance, 247 F. 2d 640, 642. The trial record makes clear that at the time of sentence Galgano's attorney, an attorney other than his present counsel, argued at length that the trial judge could impose sentence only under 18 U. S. C. § 371. The argument was rejected, the judge stating: "If I am wrong of course on the sentence the Court of Appeals will decide it. It is a very simple question." However, this question, though so discussed below, was not then raised by any of the three appellants whose appeals were decided by the opinion at 247 F. 2d 640.

the individual charged may be convicted under that statute even though the statute is not specified in the indictment. Rule 7(c) Federal Rules of Criminal Procedure; *United States* v. *Kolodny*, 149 F. 2d 210, 211 (2 Cir. 1945). Count 14 charges a conspiracy to violate 21 U. S. C. §§ 173, 174. Such a conspiracy, if proven, constitutes in itself a violation of 21 U. S. C. § 174. Similarly, Count 14 charges a conspiracy to violate 26 U. S. C. §§ 4704(a), 4701, 4703, 4724(c), and 4771(a); and such a conspiracy, if proven, constitutes a violation of 26 U. S. C. § 7237(a). Accordingly, while the citation of 18 U. S. C. § 371 may have been either mistaken or duplicitous, it did not prevent conviction for conspiracy under 21 U. S. C. § 174, or, for that matter, under 26 U. S. C. § 7237(a).

It is the rule in this circuit that an erroneous citation in an indictment will not be cause for reversing a conviction unless the defendant shows that he was prejudiced by the miscitation, *United States* v. *McKnight*, 253 F. 2d 817, 820 (2 Cir. 1958). Appellants seek to show that in the preparation of their defense they were prejudiced, and were further prejudiced by the judge's charge to the jury that Count 14 was "bottomed" upon 18 U. S. C. § 371. As to the first point we see no way in which a defense to an accusation under 18 U. S. C. § 371 would differ from a defense to a combined accusation of conspiracy in violation of 21 U. S. C. § 174 and 26 U. S. C. § 7237(a). In each case the matters the Government would be required to prove, and the statutory presumptions the defendant might be required to rebut, would be the same. As to the judge's charge, apparently appellants would have us believe that the jury could have been led to convict on a lesser quantum of evidence because appellants would receive lesser penalties under 18 U.S.C. § 371. We certainly cannot attribute to the jury any such improper conduct.

On the question of duplicity, Rule 12(b)(2) of the Federal Rules of Criminal Procedure provides that defects in

an indictment, other than those relating to lack of jurisdiction in the court or to a failure to charge an offense, may be raised only by motion before trial. The cases have consistently held that an objection to the indictment on grounds of duplicity is waived unless this objection is presented to the court prior to trial, *United States* v. *Private Brands, Inc.*, 250 F. 2d 554, 557 (2 Cir. 1957), *cert. denied*, 355 U. S. 957; *Beauchamp* v. *United States*, 154 F. 2d 413, 415 (6 Cir. 1946), *cert. denied*, 329 U. S. 723, *rehearing denied*, 329 U. S. 826; *Lemon* v. *United States*, 164 Fed. 953, 958 (8 Cir. 1908); cf. *United States* v. *Garnes*, 156 F. Supp. 467, 470-71 (S. D. N. Y. 1957), *aff'd*, 258 F. 2d 530 (2 Cir. 1958), *cert. denied*, 359 U. S. 937, or, at the very least, unless the objection is raised prior to the verdict, *Durland* v. *United States*, 161 U. S. 306, 315 (1896); *Witt* v. *United States*, 196 F. 2d 285, 286 (9 Cir. 1952), *cert. denied*, 344 U. S. 827; *United States* v. *Poppa*, 190 F. 2d 112, 114-15 (7 Cir. 1951). Judicial unwillingness to hear objections to a duplicitous indictment raised for the first time after verdict would appear to apply, *a fortiori*, to such objections raised for the first time on a motion under 28 U.S.C. § 2255. See *Dunn* v. *United States*, 234 F. 2d 219, 221 (6 Cir. 1956), *cert. denied*, 352 U. S. 899; *Masi* v. *United States*, 223 F. 2d 132 (5 Cir. 1955), *cert. denied*, 350 U. S. 919; *United States* v. *Richie*, 222 F. 2d 436, 437 (3 Cir. 1955). True it is that in a case involving the identical count of the indictment presently before us it was held that an objection to a duplicitous count may be raised for the first time by a motion under 28 U. S. C. § 2255 if the two offenses charged in the count are not subject to punishment of the same severity. *United States* v. *Shackleford*, 180 F. Supp. 857 (S. D. N. Y. 1957). The prior cases offer no support for this distinction, and we think it peculiarly inapposite where no defense has been offered that would rationally permit a verdict of guilty under the statute which imposes the lesser penalty (here either 26 U. S. C. § 7237(a) or 18 U. S. C. § 371), but not under the statute which imposes

the greater penalty (21 U. S. C. § 174). We hold that appellants have waived any objection to any duplicity in the indictment. Therefore, we do not reach the question of whether Count 14 was in fact duplicitous.

Carminati's contention that he should be given an opportunity for resentence because he was denied the right of allocution provided for in Rule 32(a) of the Federal Rules of Criminal Procedure is in this case so plainly without merit that we are not required to consider the question of whether this contention may be raised by a motion under 28 U. S. C. § 2255. See concurring opinion in *Couch* v. *United States*, 235 F. 2d 519, 521 (D. C. Cir. 1956). As we have indicated above, no defense was presented that would have afforded a rational basis for concluding that Carminati was guilty only of a violation of 26 U. S. C. § 7237(a) or 18 U. S. C. § 371 and not 21 U. S. C. § 174. Accordingly, the district judge had no alternative but to sentence Carminati under 21 U. S. C. § 174. Under that section the minimum sentence for a second offender, as Carminati is conceded to be, is ten years, Carminati's present sentence. As the district judge aptly observed, to require resentence under these circumstances would be to exalt form over substance.

Affirmed.

Nos. 731, 765, Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1960

ANTHONY CARMINATI, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

MICHAEL GALGANO, PETITIONER

v.

UNITED STATES OF AMERICA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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ANTHONY CARMINATI, PETITIONER

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No. 765 Misc.

MICHAEL GALGANO, PETITIONER

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UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals is reported *sub nom. United States* v. *Galgano* at 281 F. 2d 908. The

opinion of the district court is reported *sub nom. United States* v. *McKenney* at 181 F. Supp. 143.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1960. A petition for rehearing was denied on September 28, 1960. The time for filing a petition for a writ of certiorari in No. 765 Misc. was extended on December 28, 1960, by order of Mr. Justice Brennan, to and including January 26, 1961, and the petition for a writ of certiorari was filed on January 27, 1961.[1] The time for filing a petition for a writ of certiorari in No. 731 was extended on December 28, 1960, by order of Mr. Justice Brennan, to and including February 1, 1961 and that extension was enlarged by subsequent orders of the Chief Justice to and including February 15, 1961. The petition for a writ of certiorari was filed on February 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the fact that an indictment charging a conspiracy to violate the narcotics laws cited the general conspiracy statute (18 U.S.C. 371) as the statute violated precluded the imposition of heavier penalties specified for second offenders in the statutes

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[1] In view of the fact that petitioner had a total of 120 days in which to file his petition for a writ of certiorari, we believe the late filing, one day after the expiration of the extension granted by Mr. Justice Brennan, should preclude its consideration.

relating specifically to narcotics violations and conspiracy to commit such offenses.

2. Whether, in the particular circumstances of this case, the failure of the trial judge to ask petitioner Carminati, before sentencing, whether he had anything to say requires remand to the district court for resentencing.

STATUTES AND RULE INVOLVED

21 U.S.C. 174 (July 18, 1956, ch. 629, Title I, § 105, 70 Stat. 570) provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> * * * *

Before its amendment in July, 1956, that statute read as follows (21 U.S.C. (1952 ed.) 174):

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United

States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. * * *

* * * *

26 U.S.C. 7237 (July 18, 1956, ch. 629, Title I, § 103, 70 Stat. 568) provides in pertinent part:

Violation of laws relating to narcotic drugs and to marihuana.

(a) Whoever commits an offense, or conspires to commit an offense, described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be imprisoned not less than 2 or more than 10 years and, in addition, may be fined not more than $20,000. For a second offense, the offender shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000.

Before its amendment that statute read as follows (26 U.S.C. (1952 ed., Supp. III) 7237):

(a) Whoever commits an offense or conspires to commit an offense described in part I, or part II of subchapter A of chapter 39 for which no

> specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. * * *

Rule 7(c) Federal Rules of Criminal Procedure provides:

> * * * The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

STATEMENT

Petitioners Galgano and Carminati filed separate motions under 28 U.S.C. 2255 in the United States District Court for the Southern District of New York for correction of sentences imposed after conviction for conspiracy to violate federal narcotics laws (1 Pet. 4, 2 Pet. 7-8). The sentences which petitioners seek to have reduced were imposed after conviction on a conspiracy count of a multi-count indictment returned on November 19, 1956 in the same court. The indictment covered a period spanning the enactment of the Narcotic Control Act of 1956, which, in July 1956, increased the penalties for narcotics violations. The objects of the conspiracy were stated, in separate paragraphs, as follows: to distribute drugs not in

the original stamped package, in violation of 26 U.S.C. 4704(a) (Par. 2); to possess narcotics without having registered and paid the tax, in violation of 26 U.S.C. 4724(c) (Par. 3); and to deal in unlawfully imported narcotics, in violation of 21 U.S.C. 173 and 174 (Par. 4). Twenty-three overt acts were alleged, the first in April 1955, and the last eleven after July 1956. In parenthesis, at the end of the conspiracy count (following the last of the 23 overt acts) was the notation: Title 18, United States Code, Section 371 (R. 8; 1 Pet. App. 4).[2]

Petitioners and two others were tried before a jury. At the trial, in the instructions to the jury, the judge said, in part (R. 10-11; 1 Pet. 5, 2 Pet. 24):

> This indictment is bottomed upon Section 371 of Title 18 of the United States Code, the conspiracy statute, which makes it an offense if two or more persons conspire to commit any offense against the laws of the United States, and one or more of such persons does any act to effect the object of the conspiracy.
>
> Putting it another way—the defendants are not charged with violation of the Harrison Act or the Jones-Miller Act—those would be substantive violations. They are charged under the 14th count with a conspiracy to violate those laws.

The jury found petitioners guilty on the conspiracy count (R. 18-19; 1 Pet. 5, 2 Pet. 4).

On February 5, 1957, petitioners appeared for sentencing (R. 19-21; 1 Pet. 5, 2 Pet. 4). Galgano ad-

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[2] The certified record in the court of appeals has been filed in No. 731 and is designated herein as R. The *Galgano* petition, No. 765 Misc., is designated "1 Pet."; the *Carminati* petition, No. 731, is designated "2 Pet."

mitted that he had been convicted in 1938 of unlawfully importing and selling heroin in violation of 21 U.S.C. 173 and 174 (R. 29, 33), but objected to imposition of sentence as a second offender under the provisions of 21 U.S.C. 174 on the ground that the indictment carried a notation referring to 18 U.S.C. 371 (R. 29-33). Finding that the indictment charged and evidence adduced at the trial showed a conspiracy falling within the proscriptions of 21 U.S.C. 174, and that the conspiracy continued beyond the effective date of the 1956 amendments to the narcotics laws increasing penalties for second offenders, the sentencing judge imposed a sentence of ten years, the minimum for second offenders under 21 U.S.C. 174 (R. 34-35).

On February 14, 1957, Carminati was sentenced as a second offender to imprisonment for ten years. Before sentence was imposed, counsel for Carminati made an extensive plea for mercy for Carminati, attacking the evidence against him as developed at the trial, and stating that he had repeatedly asserted his innocence (R. 38-43). Petitioner, himself, made no statement.

Both petitioners appealed from the conviction, but did not question the validity of the sentence. The court of appeals, finding that a "conspiracy to violate the narcotics laws was conclusively proved", affirmed the convictions. *United States* v. *Carminati*, 247 F. 2d 640, 642 (C.A. 2), certiorari denied, 355 U.S. 883.[3]

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[3] The opinion in the court of appeals at one point referred to the conspiracy count as under 18 U.S.C. 371 but, as the opinion below in this proceeding notes, the matter was of no importance at that time.

In 1959, Galgano filed a motion under 28 U.S.C. 2255 for vacation of judgment and correction of sentence, claiming that he should have been sentenced to no more than the five year maximum provided in 18 U.S.C. 371 (R. 90-98). After hearing, the court denied the motion. *United States* v. *McKenney and Galgano*, 181 F. Supp. 143 (S.D.N.Y.) The court stated (p. 146):

> * * * The evidence adduced upon trial not only "conclusively proved" a conspiracy to violate the narcotics laws but it left no doubt that the hard core of the conspiracy was to violate section 174 of Title 21. The verdict of the jury must be read "guilty as charged in the indictment": it cannot be interpreted as anything less. It follows that petitioners were validly sentenced under Section 174 of Title 21. Accordingly their motions are denied.

In January 1960 a hearing was held on a motion filed by petitioner Carminati for vacation of sentence as a result of the failure of the sentencing judge to ask him whether he had anything to say prior to imposition of sentence (R. 44-59). This motion was denied, the court finding that, although there had been an unintentional failure to ask petitioner whether he had anything to say at the time of sentencing, no purpose would be served in resentencing him since the mandatory minimum sentence provisions of 21 U.S.C. 174 would require that the same sentence of ten years be reimposed (R. 60-64).[4]

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[4] The court interpreted Rule 32 of the Federal Rules of Criminal Procedure to require that the defendant be ac-

Carminati filed a subsequent motion for correction of sentence in 1960, contending that the evidence at the trial failed to show violation of 21 U.S.C. 174 and that therefore he should have been sentenced under either 18 U.S.C. 371 or 26 U.S.C. 7237, both of which permitted lower sentences than required by 21 U.S.C. 174 (R. 67). This motion was denied without opinion on the basis of the decision in *United States* v. *McKenney*, 181 F. Supp. 143 (2 Pet. 2; R. 87).

Both petitioners appealed from the denial of the motions to vacate sentence, and the court of appeals affirmed. *United States* v. *Galgano*, 281 F. 2d 908 (C.A. 2). The court held that petitioners had not been prejudiced by the mis-citation of 18 U.S.C. 371 because the government's burden of proof and the statutory presumption the petitioners were required to rebut were the same whether petitioners were to be punished under the Title 18 provision or under the provisions of the narcotics laws. The court held further that, in view of the mandatory sentence provisions of 21 U.S.C. 174, Carminati's claim that he was entitled to resentencing because he had been denied the right of allocution was without merit; to require a resentence for the same term would be "to exalt form over substance" (2 Pet. App. 24a).

ARGUMENT

1. Despite the clear provision of Rule 7(c), Federal Rules of Criminal Procedure, that mis-citation

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corded the opportunity to speak even though his counsel had made a plea for leniency (R. 60).

of a statute does not affect the validity of an indictment in the absence of a showing of prejudice, petitioners contend that the citation of 18 U.S.C. 371 in the indictment requires that they be sentenced under that statute, even though the conspiracy charged is to violate the narcotics laws. Petitioners maintain that the fact that the general conspiracy statute was cited in the indictment and referred to by the judge in his charge shows an irrevocable election to try and punish them under that statute. The short answer is that it is well settled that, where the acts charged in an indictment constitute a crime punishable under both a general and a specific statute, the specific statute governs, even though the general statute was cited by the grand jury as the basis of the indictment. See *United States* v. *Hutcheson*, 312 U.S. 219, 229; *Davis* v. *United States*, 279 F. 2d 576, 578 (C.A. 4); *Enzor* v. *United States*, 262 F. 2d 172, 174 (C.A. 5), certiorari denied, 359 U.S. 953; *United States* v. *McKnight*, 253 F. 2d 817, 820 (C.A. 2); *Masi* v. *United States*, 223 F. 2d 132, 133-134 (C.A. 5), certiorari denied, 350 U.S. 919. Both before and after the 1956 amendments, *i.e.*, for the entire period applicable here, the narcotics statutes specifically referred to conspiracy in authorizing penalties more severe for second offenders than those in 18 U.S.C. 371. It is thus clear that the Congress intended that persons conspiring to violate the narcotics laws be dealt with under the more stringent provisions of the narcotics laws (either 21 U.S.C. 174 or 26 U.S.C. 7237), rather than the general conspiracy statute, both under the Boggs Act (applicable before July

1956) and under the Narcotics Control Act of 1956. Petitioners concede that the indictment could lawfully have charged that the conspiracy violated 26 U.S.C. 7237 and 21 U.S.C. 174 (1 Pet. 7; 2 Pet. 28-29). The text of the indictment shows, we believe, that such a conspiracy was in fact charged. Paragraphs 2-4 of the indictment specifically charged as objects of the conspiracy the acts which constitute violation of the narcotics laws. Therefore petitioners cannot show that they were misled by the citation of 18 U.S.C. 371. The charge of the court, made for the purpose of enabling the jury to distinguish between the specific acts constituting unlawful traffic in narcotics and the crime of conspiring to commit those acts, could not have prejudiced petitioners by mentioning 18 U.S.C. 371 since the sole difference between that statute and 21 U.S.C. 174, as it relates to conspiracy, is in the measure of punishment.

2. The conspiracy count charged one conspiracy to commit various acts proscribed by Title 26 and 21 U.S.C. 174. The ten year sentence imposed is authorized (but not required as a minimum) for second offenders under 26 U.S.C. 7237; this was also true before the 1956 amendment. Ten years is the minimum required for second offenders under 21 U.S.C. 174 in its amended form; such a sentence was authorized prior to the amendment. Since, therefore, the ten year sentence was authorized for all periods as to all elements of the conspiracy covered by the indictment, the sentence was valid,[5] irrespective of

[5] Petitioner Carminati's assertion (2 Pet. 10-11, 38-44) that the provisions of 26 U.S.C. 7237 providing punishment

whether a lesser sentence might have been imposed under 26 U.S.C. 7237 or under 21 U.S.C. 174 before its amendment.[6]

The only reason that the question has any possible significance in this case is that, in ruling on the effect of the trial judge's failure to ask petitioner Carminati whether he had anything to say before sentence was imposed, the courts below ruled that there was no prejudice inasmuch as petitioner received the minimum required for second offenders under 21 U.S.C. 174.[7]

We think it clear that the trial judge, in the circumstances of this case, was bound to impose a minimum sentence of 10 years. As the district court stated (*United States* v. *McKenney*, 181 F. Supp. 143, 146), a conspiracy to violate 21 U.S.C. 174 was the "hard core" of the conspiracy.[8] Moreover, as

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for second offenders is unconstitutional under the Fifth and Sixth Amendments is without merit. The statute provides a basis for determining sentence to be imposed *after* conviction, and petitioner does not contend that the evidence of a prior conviction was improperly used in the trial of the matter for which he was convicted.

[6] See *United States* v. *Shackelford*, 180 F. Supp. 857 (S.D. N.Y.), a decision questioned in the opinion below, where the court ruled it had authority to sentence under the lesser penalties of Title 26 rather than the greater under Title 21.

[7] Although we discuss the merits of the allocution issue, it remains an open question whether the matter is one available on collateral attack. See *Green* v. *United States*, Nos. 70, 179, this Term, decided February 27, 1961, slip op., p. 3.

[8] The facts developed at the trial (see government's brief in opposition in Nos. 496 and 497, October Term 1957) show

Judge Waterman observed in the opinion below, "no defense was presented that would have afforded a rational basis for concluding that Carminati was guilty only of a violation of 26 U.S.C. 7237(a) or 18 U.S.C. 371 and not 21 U.S.C. 174" (2 Pet. 24a). In these circumstances, a remand for resentencing would be an idle gesture.*

CONCLUSION

It is respectfully submitted that the petitions for writs of certiorari should be denied.

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MARCH 1961.

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that the conspiracy related to heroin which cannot legally be imported and for the manufacture of which no opium may be imported.

* Petitioner attempts to read prejudice into his subsequent election (fourteen days after imposition of sentence) not to begin to serve his sentence pending the direct appeal, as a result of which he served 309 days for which he received no credit (2 Pet. 7, 9). That this course of events has no relationship to any prejudice resulting from the failure to accord petitioner the right to speak in his own behalf is clear, since it occurred two weeks after the imposition of the sentence and the accompanying error of which he complains.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 731

ANTHONY CARMINATI, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

ANSWER TO OPPOSITION OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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ANTHONY CARMINATI, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

ANSWER TO OPPOSITION OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI

On January 9, 1957, the trial court instructed the jury:

"In *a* conspiracy charge there is no need to prove an actual violation of *a* specific law, or the sale or delivery, or the facilitation of the sale and delivery of narcotics. For two or more persons to conspire or combine to commit, or cause to be committed, a breach of the criminal laws of the United States is an offense of grave character. • • • *Because of this, a conspiracy to commit a crime is made by statute an entirely distinct offense, separate from the substantive crime itself.* • • •"

"This indictment is bottomed upon Section 371 of Title 18 of the United States Code, the conspiracy statute, which makes it an offense if two or more persons conspire to commit any offense against the laws of the United States, and one or more of such persons does any act to effect the object of the conspiracy. • • • Putting it another way, the defendants are not charged with violations of the Harrison Act or the Jones-Miller Act—those would be substantive violations. They are charged under the 14th Count with a conspiracy to violate those laws." (J.A. 10, 11.)

A further examination of the charge to the jury (J.A. 9 thru 16) will reveal that the jury was told to find Anthony Carminati guilty of a conspiracy in violation of 18 U.S.C. 371 and not of conspiring in violation of 21 U.S.C. 174. It did, and so did the Court of Appeals in 247 F. 2d 640, 642 on Aug. 22, 1957.

Nowhere did the court at any time state that the defendant was being tried for *a conspiracy in violation of 21 U.S.C. 174* as amended by the Narcotics Control Act of 1956.

The trial court further instructed the jury that

"• • • sections 4701, 4703, 4704(a), 4724(c) and 4771(a) of Title 26 of the United States Code, *sometimes referred to as the Harrison Act*, make it an offense to sell or distribute narcotics except from an original container to which are affixed revenue stamps; and also makes it illegal for one to sell or distribute narcotic drugs without registering with the Secretary of the Treasury for that purpose. *Then there are sections 173 and 174 of Title 21 of the United States Code, known as the Jones-Miller Act*, which make it a crime to import a narcotic drug into the United States contrary to law, or to receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of any such drug after importation—knowing the same to have been imported contrary to law. These are the laws which the Government charges the defendant(s) conspired to violate. • • •

> This indictment is bottomed upon section 371 of Title 18 of the United States Code, the conspiracy statute, which makes it an offense if two or more persons conspire to commit any offense against the laws of the United States, and one or more of such persons does any act to effect the object of the conspiracy." (J.A. 10.)

This instruction specifically refers to the Harrison Act and the Jones-Miller Act, neither of which contain a built-in conspiracy clause pertaining to substantive conspiracies relating to violations of narcotic laws.

Therefore, the claim that the statute on which an indictment is founded is to be determined from the facts charged in the indictment, and the facts pleaded may bring the offense within one statute, although another statute is referred to in the indictment, is not apropos to the instant case with the only possibility being that it could have been under the facts pleaded, brought, under Sec. 7237 of Title 26 as it appeared on the Statute books prior to July 19, 1956, but definitely not under 21 U.S.C. 174 as it appeared prior to July 19, 1956, although 18 U.S.C. 371 is referred to in the indictment. But even this possibility must fall by the wayside because of the court's specific instructions concerning the Harrison Act and the Jones-Miller Act. (See J.A. 11).

Your petitioner contends that the English language is not too hard to understand and when a jury is instructed that a defendant is not charged with violations of the Harrison Act or the Jones-Miller Act because those violations would be substantive violations, it means just that.

To set the record straight once and for all—the Harrison Narcotic Act at the time the indictment was drawn was no longer on the statute books!

The Harrison Narcotic Act was replaced by the Boggs Act on November 2, 1951! (P.L. 255, 82nd Congress.)

The Jones-Miller Act was replaced by the Boggs Act on November 2, 1951. (P.L. 255, 82nd Congress.)

When the trial judge instructed the jury that "Sections 173 and 174 of Title 21 of the United States Code known as the Jones-Miller Act make it a crime to import a narcotic drug into the United States contrary to law, or to receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of any such drug after importation—knowing same to have been imported contrary to law—and that this was the law the Government charged Carminati conspired to violate—he set the stage for the verdict of guilty under 18 U.S.C. 371 and specifically and forever ruled out his right to sentence Anthony Carminati as a second offender under the Narcotics Control Act of 1956, which replaced the Boggs Act on July 19, 1956. (P.L. 728, 84 Cong.)

If the trial court mistakingly or incorrectly identified section 174 of Title 21 U.S.C. as amended by the Narcotic Control Act of 1956, as the Jones-Miller Act, which later Act as part of the substantive statute contains a built-in conspiracy clause, then the jury surely was told that it could not find Anthony Carminati guilty of a conspiracy in violation of 21 U.S.C. 173, to violate sec. 174.

Therefore, a conviction of conspiracy under 18 U.S.C. 371 to violate the Harrison Act and/or the Jones-Miller Act, neither of which contain a built-in conspiracy clause, with the instructions as they were given and the indictment as it was written, limited the trial court as to what sentence it could impose, and misled the jury in its instructions.

But that limitation never saw the light of day because when Anthony Carminati appeared for sentencing, without even affording him the opportunity of speaking in his own behalf in mitigation of any sentence or affording him the opportunity of telling the court why any sentence should

not be imposed, a right that can't be waived under Rule 32(a) of the F.R.Cr. P. the court sentenced him thusly:

> "After taking into consideration all the factors which the Court deems pertinent in a matter of this kind, the defendant is sentenced to a period of ten years." (J.A. 43).

The jury's verdict in light of the instructions given, did not justify the trial court's conclusion that the core of the conspiracy was to violate 21 U.S.C. 174 so that it could apply the harsher punishments prescribed under that statute. (J.A. 86-87)

For the Respondent to attempt to explain away the errors committed by the lower courts and say that the Harrison Act means the various sections of Title 26 of the United States Code punishable under section 7237(a) of the Narcotic Control Act of 1956 which contains a built-in conspiracy substantive crime clause relating to narcotic drugs in particular and that the Jones-Miller Act really means sections 173 and 174 of Title 21 of the United States Code as amended by the Narcotics Control Act of 1956 which also contains a built-in conspiracy substantive crime clause relating to narcotic drugs which have been known to a defendant to have been illegally imported in the first place—is stretching the imagination a little too far.

For the record, the Harrison Act and the Jones Miller Act as such, were replaced by the Boggs Act in 1951, which, for the first time, included a built-in conspiracy clause within the substantive statute(s) involved and increased the punishment for violators and Sec. 2(a) of the Narcotic Drugs Import and Export Act as amended by the Boggs Act (P.L. 255, 82 Cong. Nov. 2, 1951) read in part—"Upon conviction for a second or subsequent offense"—the imposition or execution of sentence shall not be suspended and probation shall not be granted." • • •

That language is not too hard to understand. It says 'upon conviction' for a second or subsequent offense'—and to your petitioner it means upon a conviction had wherein he has been charged in the indictment for a second offense and found guilty by the jury for a second offense, and that if an attempt by statute to create any other way of making the defendant a second offender without being charged or tried as such but declared to be for the purpose of inflicting a harsher punishment, then that attempt on the part of Congress is beyond the power conferred by the Constitution and must be declared void.

No other logical explanation is possible since Section 174 of Title 21, U.S.C., a part of the Jones-Miller Act as enacted into law on May 22, 1922 and amended on June 7, 1924, (c. 352, 43 stat. 657) read exactly as the trial judge informed the jury. (J.A. 14, 15.)

The balance of the Act remained intact and effective until November 2, 1951 and read: "• • • such person, shall upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years.

Not a single word in the Jones-Miller Act as it related to 21 U.S.C. 174 up to November 2, 1951 spoke of the crime of conspiracy in any fashion whatsoever!

Therefore, when Anthony Carminati was given a bald sentence of ten years, without being advised for what other crime other than knowing that he had been indicted for a conspiracy in violation of 18 U.S.C. 371, he received a sentence amounting to *double* the *maximum* allowed under 18 U.S.C. 371; the *maximum* under the Jones-Miller Act; the *maximum* under 21 U.S.C. 174 as amended by the Boggs Act which was in effect when the prosecution's witness said the conspiracy ended as far as Carminati was concerned, and *double* the *minimum* of the more lenient of the two minimum mandatory sentences under the Narcotics Control Act of 1956. (See Judge Levet's opinion in *U. S. v. Shackleford*, 180 F. Supp. 857, (2nd Cir.) (1957)) (J.A. 74-80.)

In the past, whenever 21 U.S.C. 174 was involved in a narcotics prosecution it was presumed that the heroin was imported and imported illegally and any protests made contrary to this presumption were ignored. (See Trial Court's instructions, J.A. 14, 15.)

But, when the Narcotics Control Act of 1956 became effective on July 19, 1956 and Chapter 68 headed "NARCOTICS"* was added to Title 18 of the United States Code

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*Report #1997, Calendar No. 2014, 84th Cong. 2nd Session:

"• • • The purpose of the proposed legislation is to establish a new chapter, "Chapter 68—Narcotics," in the Federal Criminal Code outlawing the drug heroin and defining crimes and providing increased penalties for the smuggling, sale and transportation of heroin and marihuana, etc. • • •"

(p. 7)—"• • • It is now unlawful to import or to produce heroin in this country. • • • (p. 12) ANALYSIS OF THE BILL:—Definitions:—Section 1401 defines for the first time in any Federal narcotic law the drug heroin according to its chemical properties. Such a chemical definition lends itself to a positive and accurate identification of the narcotic drug regardless of its derivation, whether extracted from the opium poppy by normal processes or manufactured synthetically.

HEROIN—PENALTIES: Section 1402 defines and provides penalties apart from the provisions of any other narcotic law for the unlawful importation of heroin or its sale subsequent to the unlawful importation. At present all prosecutions for engaging in such activity are brought under two Federal statutes, the Narcotics Drugs Import and Export Act, and the Harrison Anti-Narcotic Act. These two basic narcotic laws control and regulate every type of narcotic drug, including the newer synthetics.

This section is designed to supersede the provisions of the Narcotics Drugs Import and Export Act only insofar as they relate to the unlawful importation of heroin or its subsequent sale, and all future prosecutions will be brought under this section with its more stringent penalties. It is not the intention of the committee, either directly or indirectly to repeal or otherwise make inapplicable to heroin any of the relevant provisions of the Harrison Anti-Narcotic Act. • • •

and in the very first section, 1401, there appears—"The term 'heroin' shall mean any substance identified chemically as diacetylmorphine or any salt thereof" * * *—that confession on the part of the Government that heroin is a chemical, whose official formula is $C_{12}H_{23}O_5$, means that it can be produced synthetically in the laboratory anywhere, and doesn't have to be imported or brought in contrary to sec. 173 of Title 21 before persons dealing in the commodity or conspiring to deal in the commodity could be charged with a violation of the narcotic laws. (See J. Level's opinion regarding this very point, J.A. 76.) Now—since 21 U.S.C. 174 was in effect when Petitioner's case was prosecuted either as the Boggs Act or as amended by the Narcotics Control Act of 1956, he believes that before the Government undertook to prosecute him for a conspiracy in violation of that section, the presumption of importation was insufficient in light of 18 U.S.C. 1401, and unless that presumption was overcome by more than just another presumption, the only conspiracy he could have been charged with, tried for, convicted and punished for was the crime of conspiracy codified as 18 U.S.C. 371 and nothing else.

The first and elementary necessary proof needed to go forward (illegal importation) and prove the conspiracy *in violation of 21 U.S.C. 174* was lacking and was not offered.

That important shortcoming was called to the attention of the jury by the trial court thusly:

> "I direct your attention to another provision of the Jones-Miller Act. You will recall that two essential elements of the offense charged are:
>
> (1) that the heroin was unlawfully imported; and
>
> (2) that the defendant had knowledge of the unlawful importation.
>
> It will occur to you that no direct evidence was offered by the Government that the drug was imported or that the defendant had knowledge of such importation.

However, Section 174 of Title 21 of the United States Code, in the Jones-Miller Act, further provides: 'Whenever on trial for a violation of this section the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.' *Thus, under the law, possession of narcotics gives rise to an inference that the narcotics were imported contrary to law, and a further inference that the person in possession had knowledge of such unlawful importation.* Again, you understand it is not necessary to show actual physical or direct possession by any defendant. Possession of any sort—actual or constructive—is sufficient to raise the presumption under the statute which I have just read you and to place upon the accused the burden of explaining the possession to the jury."

It should therefore follow that before Anthony Carminati was even presumed to be guilty of a conspiracy *in violation of 21 U.S.C. 174* to commit the acts declared illegal under sec. 173 and 174 of Title 21 U.S.C., that the Government should have been required to offer proof that the narcotic was imported, and without that proof, the rest of the statute could not apply, from either the substantive or conspiracy section of section 174 as amended by the Narcotics Control Act of 1956, or for that matter, under the Boggs Act which was in effect when Carminati's participation in the conspiracy ended.

Judge Levet in his opinion concerning a co-defendant of Carminati's, Shackleford, in 180 F. Supp. 857, ruled:

"* * * It is also conceivable that persons might conspire to violate one statute without conspiring to violate the other. This, several persons might conspire to sell *domestic* narcotics, other than from the original stamped package, in violation of the Harrison Act. *In such case, since the narcotics were not imported, nor would there be the requisite possession to give rise to the presumption of unlawful importation, there would be, under those circumstances and conditions, NO violation of the Jones-Miller Act.*" (J.A. 76.)

To fortify Carminati's claim that the conspiracy, as far as he was concerned was over and done with for at least five months before the Narcotics Control Act of 1956 became effective—this Honorable Court's attention is called to Oglesby's* testimony, (P. 130 transcript Jan. 8, 1957):

> Q. So that the last (meeting) one you testify about was the latter part of January or February of 1956, is that right?
>
> A. That was the early part of 1956, the beginning of 1956.
>
> Q. Yes, January or February, isn't that what you said?
>
> A. Yes.
>
> Q. When was the next time?
>
> A. I don't remember seeing him again after that * * * until yesterday and today (January 7 and 8, 1957).

Query: If a conspiracy conviction can be had on the uncorroborated testimony of an accomplice, and that conspiracy, once established, is presumed to continue until the contrary is established, why shouldn't uncorroborated testimony of the same accomplice setting the cut-off date for the end of the conspiracy as far as the defendant is concerned be presumed and accepted too?

It is undoubtedly true that in several instances a presumption created by statute meets the tests of due process heretofore laid down by this Court, but when by another statute the rational connection between the facts proved and the ultimate fact presumed is weakened or destroyed, that statute becomes more than just a regulation of the legislature. It casts an unfair and practically impossible burden of persuasion upon the defendant, who in order to escape conviction only by testifying, is compelled, in violation of the Fifth Amendment, to give evidence against himself.

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*Chief government witness, chief informer and co-conspirator in C-151-226.

To apply that theory to the case at hand—21 U.S.C. 174 concerns itself with illegally imported heroin, known to have been illegally imported and the charge of conspiring to violate 21 U.S.C. 173 which forbids the importation or bringing in of heroin or the ingredient necessary to manufacture heroin without the sanction of the proper government agency charged with the control of this traffic.

Section 174 further decrees that whoever receives, conceals, buys, sells or facilitates the transportation of such illegally imported drug knowing that it had been imported and or brought in contrary to law, or conspires to commit any such acts *in violation of* the laws of the United States shall be punished in accordance with the provisions set out therein.

In *Yates v. U. S.*, 77 S. Ct. 1064 at 1073, 354 U. S. 298, at 311, 312, this Court held "the portions of the trial court's instructions are not clear or specific to warrant our drawing the inference that which the jury must find * * * in order to convict. (In the footnote marked 16, the Court notes: "The trial court did no more on this score than to charge in the language of the indictment, * * * and then instruct the jury that it must find that "the conspiracy charged in the indictment" had been proved beyond a reasonable doubt. "Further, in order to convict, the jury was required, as the court charged, to find an overt act which was knowingly done in furtherance of an object or purpose of the conspiracy charged in the indictment,"—and we have no way of knowing whether the overt act found by the jury was one which it believed to be in furtherance of (one) rather than the (other) objective of the alleged conspiracy. The character of most of the overt acts alleged associates them as readily with (one) as with (the other).

(In your petitioner's case, the alleged overt acts in accordance with the trial court's charge—"In a conspiracy charge there is no need to prove an actual violation of a specific criminal law, or the sale and delivery, or the facilitation of the sale and delivery of narcotics, (J.A. 9.) pointed to the general conspiracy statute and not to the ones referred to by the Government in its attempt to justify the present status of Anthony Carminati's case.)

The Court in the *Yates* case continued,

> "In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which one the jury selected." (cases cited: *Stromberg* v. *State of California*, 283 U. S. 359, 367-368, 51 S. Ct. 532, 535, 75 L. ed. 1117; *Williams* v. *State of North Carolina*, 317 U. S. 287, 291, 292, 63 S. Ct. 207, 209, 210, 87 L. ed. 279; *Cramer* v. *United States*, 325 U. S. 1, 36, 65 S. Ct. 918, 935, note 45, 89 L. ed. 1441.)
> • • •
>
> "But the very subtlety of these distinctions required the most clear and explicit instructions with reference to them, for they concerned an issue which went to the very heart of the charges against these petitioners. The need for precise and understandable instructions on this issue is further emphasized by the equivocal character of the evidence in this record • • • Particularly in light of this record, we must regard the trial court's charge in this respect as furnishing wholly inadequate guidance to the jury on this central point in the case. We cannot allow a conviction to stand on such "an equivocal direction to the jury on a basic issue." *Bollenbach* v. *U. S.*, 326 U. S. 607, 613, 66 S. Ct. 402, 405, 90 L. ed. 350."

How very similar is this declaration to what can be claimed and decided in the instant case!

In *Tot* v. *U. S.*, 63 S. Ct. 1241 at pp. 1247, 1248, 319 U. S. 463 at 478, this Court stated:

"The procedural safeguards found in the Constitution and in the Bill of Rights (citing Chambers v. Florida, 309 U. S. 227, 237, 60 S. Ct. 472, 477, 84 L. Ed. 716,) stand as a constitutional barrier against thus obtaining a conviction, i.e.: (convicting on a charge even tho no evidence whatsoever has been offered which tends to prove an essential ingredient of the offense) (and) These constitutional provisions contemplate that a jury must determine the guilt or innocence in a public trial in which defendant is confronted with the witnesses against him and in which he enjoys the assistance of counsel; and where guilt is in issue, a verdict against the defendant must be preceded by the introduction of some evidence which tends to prove the elements of the crime charged. Compliance with these constitutional provisions, which of course constitute the supreme law of the land, is essential to due process of law, and a conviction obtained without their observance cannot be sustained. It is unnecessary to consider whether this statute, which puts the defendant against whom no evidence of guilt has been offered in a procedural situation from which he can escape conviction only by testifying, compels him to give evidence against himself in violation of the Fifth Amendment."

Yet, the court below in *Carminati* v. *U. S.*, 281 F. 2d 908, condemned the petitioner thusly:

"True it is that in a case involving the identical count of the indictment presently before us it was held that an objection to a duplicitous count may be raised for the first time by a motion under 28 U.S.C. 2255 if the two offenses charged in the count are not subject to punishment of the same severity. United States v. Shackleford, 180 F. Supp. 857 (S.D.N.Y. 1957). (But), The prior cases (cited by the court) offer no support for this distinction, and we think it peculiarly inapposite where no defense has been offered that would rationally permit a verdict of guilty under the statute which imposes the lesser penalty (here either 26 U.S.C. 7237(a) or 18 U.S.C. 371), but not under the statute which imposes the greater penalty (21 U.S.C. 174). We hold that appellants have waived

> any objection to any duplicity in the indictment. Therefore, we do not reach the question of whether Count 14 was in fact duplicitous."

From that opinion it seems that the Second Circuit approves of the very conduct condemned as unconstitutional under the theory and law prescribed in *Tot* v. *U. S.* case, 63 S. Ct. 1241, (*supra*) and considers it better practice for a defendant to give evidence against himself in violation of the Fifth Amendment, even though no evidence of guilt has been offered by the prosecution before or during the trial so that the charge under 21 U.S.C. 174 could hold water.

Ordinarily, when the Government counters a petitioner's complaint on an excessive sentence situation, the settled proposition that "a sentence which is within the legal limits of the statute involved will not be disturbed"—is of sufficient strength to cut off petitioner's prayer for relief unless, of course, reversible error has been committed whereby he would be entitled to either a new trial or outright release because of some violation of his Constitutional rights or entitled to some other form of relief as provided for by law.

However, in petitioner's case, the respondent's attempt to close the matter and the reason given, is not well taken.

In any event, Carminati, in accordance with the indictment drawn, the charge, the instructions and the verdict, the jury found him guilty of a conspiracy in violation of 18 U.S.C. 371 and nothing else. In *Gaddis* v. *U. S.*, 280 F. 2d 334, 336, the court ruled:

> "(When) There is an inconsistency, however, in the pronouncement of sentence and the judgment of conviction. * * * When there is any ambiguity, the prisoner is entitled to have the language in the pronouncement construed most favorable to him."

And, if the Government persists in justifying the imprisonment and sentence imposed on your petitioner under any statute other than 18 U.S.C. 371, it ought to at least concede that the sentence *might* have had some justification under sec. 7237 of Title 26 or sec. 174 of Title 21 as they existed prior to July 19, 1956, but—since the trial judge indicated that it was his intention to punish Carminati by giving him the mandatory minimum under the Narcotic Control Act of 1956 (which contains not one but two mandatory minimums for conspiracies in violation of the particular statutes involved)—he ought to be re-sentenced under the most lenient one. (See *Ladner* v. *U. S.*, 230 F. 2d 756, reversed and remanded 358 U.S. 169, 79 S. Ct. 209, 3 L. ed. 2nd 199. (Generally stated the "Rule of Lenity" is that where the intention of Congress is not clear from the Act itself, and reasonable minds might differ as to its intention, the Court will adopt the less harsh meaning. Also see opinion *U. S.* v. *Shackelford*, 180 F. Supp. 857, C-151-226, a co-defendant of the petitioner on C-151-226; *U. S.* v. *Ogull*, 149 F. Supp. 272; and *U. S.* v. *Bazzell*, 187 F. 2d 878).)

Your petitioner respectfully refers this Honorable Court to the decisions of this Court in *Blockburger* v. *U. S.*, 284 U.S. 299, 52 S. Ct. 180 and the language of the opinion used by the Court in *U. S.* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 73 S. Ct. 227, citing Chief Justice Marshall's statement in *U. S.* v. *Fisher*, 2 Cranch 358, 386, 2 L. ed. 304—"• • • Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived."

Justice Frankfurter, in delivering the opinion of the Court in the *Universal C.I.T.* case, *supra*, at p. 229 of 73 S. Ct. 227, continued:

"• • • Particularly is this so when we construe statutes defining conduct which entails stigma and penalties and prison. Not that penal statutes are not

> subject to the basic consideration that legislation like all other writings should be given, insofar as the language permits, a commonsensical meaning. But when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language clear and definite. We should not derive criminal outlawry from some ambiguous implication."

So when a sentencing court takes it upon itself to determine that where a jury brings in a verdict of guilty of a conspiracy to violate certain laws, and those certain laws contain built-in conspiracy clauses, each set of laws carrying with it a different punishment for those who conspire in violation of the substantive laws involved, why, or under what precept of law can the sentencing judge justify the harshest mandatory minimum sentence noted in the overall act by ruling that the hard core of the conspiracy was to violate the particular statute which carries with it the harshest sentence?

In *Delli Paoli* v. *U. S.*, 77 S. Ct. 294 at p. 300, 352 U.S. at p. 242, the Court states:

> "It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. * * * To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict."

The jury was not instructed to find the defendant guilty of a conspiracy in violation of 21 U.S.C. 174—the jury found the defendant guilty of a conspiracy to violate 5 sections of Title 26 and 2 sections of Title 21 U.S.C.—and that guilty conduct was translated by the Court of Appeals for the Second Circuit in petitioner's first appeal taken on other grounds (247 F. 2d 640 (1957))—thusly:

"Appellant was convicted upon an indictment charging him with *'a conspiracy in violation of* 18 U.S.C. 371 to receive, possess, and sell heroin in violation of the federal narcotic laws. • • • ."

So to answer the Government's query in its opposition to Petitioner's plea for a writ of certiorari as to whether the fact that an indictment charging a conspiracy to violate the narcotics laws cited the general conspiracy statute (18 U.S.C. 371) as the statute violated, precluded the imposition of heavier penalties specified for second offenders in the statutes relating specifically to narcotic violations and conspiracy to commit such offenses—your Petitioner claims that in his instant case, under the circumstances and facts made known to the court, the answer ought to be that the sentencing court must be precluded from imposing the heavier penalties specified because of the language of the indictment, because of the explanation of the laws given by the court to the jury, because of the instructions, because of the verdict of the jury, and last but not least, because of your Petitioner's belief that "when Congress has not explicitly stated what the unit of offense is, the doubt ought to be judicially resolved in favor of lenity." *Bell v. U. S.*, 349 U.S. 81, 75 S. Ct. 620, 99 L. ed. 905.

And above all, your Petitioner firmly believes that when an act of Congress, such as the Narcotics Control Act of 1956 is written in such a vague and indefinite fashion wherein the separate crime of conspiracy is subject to different punishments at the whim of a trial court and where the method of determining a second offender for the purposes of inflicting harsher sentences is contrary to the Fifth and Sixth Amendments and in violation of Rule 7 of the Federal Rules of Criminal Procedure, then the whole act, ab initio, is unconstitutional.

Petitioner further asks this Honorable Court to recognize the ruling of the Hon. Justice Harlan in *Callan* v. *Wilson*, 8 S. Ct. 1301, 127 U.S. 540, wherein the Court stated:

> "* * * Except in that class or grade of offenses called 'petty offenses,' which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guaranty of an impartial jury to the accused in a criminal prosecution, conducted either in the name or by or under the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged. *In such cases, a judgment of conviction, not based upon a verdict of guilty by a jury, is void.*"

Anthony Carminati contends that if he was to be tried as a second offender, since the Act provides a harsher punishment for persons designated as second offenders, the judgment of conviction in his case, lacked the elementary essential safeguards guaranteed to him under the Constitution and the Federal Rules of Criminal Procedure, and if the Court of Appeals in 281 F. 2d 908, *supra*, insists that the judgment of conviction rendered in petitioner's original case is a conviction for a conspiracy in violation of 21 U.S.C. 174, such conviction was not based upon the verdict of the jury, and is void!

On page 11 of the Government's opposition—the statement "The charge of the Court, made for the purpose of enabling the jury to distinguish between the specific acts constituting unlawful traffic in narcotics and the crime of conspiring to commit those acts, could not have prejudiced petitioners by mentioning 18 U.S.C. 371 since the sole difference between that statute and 21 U.S.C. 174, as it relates to conspiracy, is in the measure of punishment."

It is patent that the error in the lower courts' reasoning and followed through by the Government here is more clear when the court below in 281 F. 2d 908 insists that

"the citing of 18 U.S.C. 371 which may have been a mistake or duplicitous (and it was not!)—does not prevent a conviction for conspiracy under 21 U.S.C. 174, or for that matter, under 26 U.S.C. 7237(a)".

That court forgets that the conviction was based on the indictment, and the jury's instructions—all indicating that the charge was a conspiracy in violation of 18 U.S.C. 371.

The specific portion of 21 U.S.C. 174 which the trial court applied in justifying the sentence imposed on Carminati reads:

> "• • • or conspires to commit any such acts in violation of the laws of the United States • • • "

should have put the court on guard that the language of the statute meant where *a conspiracy in violation of the* previously mentioned *substantive acts* was planned to be violated and not a conspiracy in violation of 18 U.S.C. 371 to violate the substantive sections mentioned in the first paragraph of the indictment.

Petitioner would therefore agree with the general proposition of law that where a general statute and a special statute cover the same area, that the special statute be construed and acknowledged as the proper one on which a defendant should be proceeded against, but he cannot agree that where the indictment is accepted by the defendant, the prosecution, the court and the jury as describing the crime of conspiracy in violation of 18 U.S.C. 371, that the court has a right to sentence the defendant under a separate, distinct and different criminal statute from that for which he was convicted.• • •.

On August 22, 1957, in *U. S.* v. *Carminati*, 247 F. 2d 640, the Court of Appeals for the Second Circuit ruled:

> "Appellant was convicted upon an *indictment charging* him with *a conspiracy in violation of 18 U.S.C. 371.* • • • "

This is res judicata!

On September 2, 1959, the trial court in denying the motions for relief filed by defendants Galgano and McKenney noted: "Petitioners * * * together with others, *were convicted upon a trial by jury of conspiracy to violate* certain provisions of the narcotics laws including section 174 of Title 21. * * * Count 14 of the indictment, the only one which concerns us here, charges in four paragraphs that petitioners and others *conspired to violate* seven specific provisions of law, namely * * *. Next appears a list of overt acts allegedly done in furtherance of the conspiracy. At the end of the list is the following citation, Title 18, U.S.C. Section 371."

On April 4, 1960, in denying petitioner's plea for relief under 28 U.S.C. 2255 and/or Rule 35 F. R. Cr. P., the trial court referred to the opinion of September 4, 1959 as its reason for denying petitioner's motion.

That opinion (sub. nom. *U. S.* v. *McKenney, et al.*, 181 F. Supp. 143), reads in part—"* * * Petitioners proceed on the assumption that Congress by the inclusion of the words 'or conspires' under the 1951 amendments to section 174 of Title 21 and section 7237(a) of Title 26, created a new, separate and distinct crime of conspiracy. *The amendments* to those sections simply related to the matter of punishment and *did not create a new crime.* * * *" (J.A. 85)*

On August 22, 1960, in *Carminati* v. *U. S.*, 281 F. 2d 908, the Court of Appeals for the Second Circuit stated:

> "* * * Count 14 charges a conspiracy *to violate* 21 U.S.C. 173, 174. *Such a conspiracy, if proven, constitutes in itself a violation of 21 U.S.C. 174.* Similarly, count 14 charges a conspiracy to violate 26 U.S.C. * * *; and such a conspiracy, if proven, constitutes a violation of 7237(a). Accordingly, while the citation of 18 U.S.C. 371 may have been either mistaken or duplicitous, it did not prevent *conviction* for conspiracy under 21 U.S.C. 174, or for that matter, under 26 U.S.C. 7237(a). * * *" (Appendix, Pet. B. 22a.)

Obviously, petitioner proceeded and assumed properly and correctly despite the trial court's insistence that the amendments to the sections involved "simply related to the matter of punishment and did not create a new crime."

The trial court's theory is contrary to this Court's findings in *U. S. v. Callanan*, 81 S. Ct. 321 (1961), where the substantive crimes under 18 U.S.C. 1951 and the built-in conspiracy clause of the same section were declared to be separate and distinct crimes. The headnote of the case reads:

> "Proceeding on motion to correct sentence imposed on a federal prisoner. * * * The Supreme Court, Mr. Justice Frankfurter held that the prisoner was convicted under the Hobbs Anti-Racketeering Act of the substantive crime of * * * and *was also convicted under such Act of conspiracy to commit the same crime, —was convicted of two distinct crimes*, and under such Act it was within the discretion of the trial judge to fix separate consecutive sentences *for each crime*."

In the original case, *Callanan v. U. S.*, 173 F. Supp. 98, Judge Weber stated:—"Movant was convicted in this court under an indictment in two counts charging him with conspiracy to extort in the first count and with the substantive offense of extortion in the second count. The indictment was based upon Title 18, sec. 1951, U.S.C., known as the Hobbs Anti-Racketeering Act."

Is it not a fact too that under the Sherman Anti-Trust Laws, 15 U.S.C. 1-7, et seq., that a defendant may and has been charged with a conspiracy and a substantive crime under section 1 of the Act and upon conviction, sentenced for being found guilty of two separate crimes, and haven't such findings been upheld by this Court?

Yet, in the Second Circuit, the district and circuit courts cannot agree as to whether or not such amendments do or do not create a new crime. (J.A. 85, 86.)

The Court of Appeals in 1957 in petitioner's case ruled—"Appellant was convicted upon an indictment charging him with a conspiracy in violation of 18 U.S.C. 371 * * *" (*U. S.* v. *Carminati*, 247 F. 2d 640).

Judge Levet writes (180 F. Supp. 857):

> "Consequently, count 14 of the indictment charges the defendant with conduct which is punishable under *three* separate sections, each of which entails a different punishment. (J.A. 75) * * * With the inclusion of the words, 'or conspires' in the *two* narcotic statutes (174 of Title 21 and 7237(a) of Title 26, U.S.C.), a conspiracy to violate the narcotic laws is now a crime under these statutes. (J.A. 76.) * * * In the instant case, the conspiracy count charges more than a single crime since it is now a distinct offense to conspire to violate either the Jones-Miller Act or the Harrison Act, and the latter is not necessarily includible in the former. (J.A. 78.) We cannot now ascertain upon which statute the jury based their general verdict of guilty. Although the evidence in the case (Shackleford's case) supports a conviction under both the Jones-Miller Act and the Harrison Act, it is my opinion that a sentence under the former, pursuant to which a greater penalty is imposed, would be prejudicial to the defendant * * * despite his failure to object to the duplicity before trial. Accordingly, the defendant should not be sentenced, in my opinion, under 21 U.S.C. 174.
>
> There remains to be considered whether punishment is to be imposed under sec. 7237(a) of Title 26 U.S.C. which prescribes a minimum penalty of two years imprisonment for a violation of the Harrison Act, or under the general conspiracy provision in 18 U.S.C. 371 which does not specify any minimum penalty. As between the two statutes, the particular is entitled to preference over the general statute. (cases cited.) * * * Accordingly, it is the opinion of the Court that the defendant should be sentenced under section 7237(a) of Title 26, U.S.C. * * * I therefore sentence David Shackleford to the minimum 2 years under section 7237(a) of Title 26." (J.A. 79.)

If the sentencing court insists that it had the power to impose a ten year sentence on Carminati because it presumed from the verdict that the hard core of the conspiracy was to violate 21 U.S.C. 174 as amended by the Narcotics Control Act of 1956, then what the Government wants this Court to believe is that the jury found the petitioner guilty of conspiring in violation of 21 U.S.C. 174, to commit the illegal acts listed in sec. 174, and too, that Carminati was either not guilty of the charge of conspiring in violation of 18 U.S.C. to violate the Title 26 sections noted in the indictment or that the guilt relating to 21 U.S.C. 174 was greater than the guilt under the Title 26 statutes for which section 7237(a) prescribed more lenient punishment.

To attribute to Congress an intent to repeal 18 U.S.C. 371 in such cases, or to give to the courts a mandate to sentence a defendant convicted of a conspiracy in violation of 18 U.S.C. 371, to a more severe penalty without being first indicted for such an offense, or to subject him to even more severe penalties if he is to be punished under the amended provisions of either the old or new laws pertaining to narcotics offenses when the indictment, the evidence, the instructions and the verdict of conviction showed that he was entitled to be punished under the law(s) in effect prior to July 19, 1956—is a usurpation of the court's power to sentence a defendant for the crime for which he was indicted, tried and convicted.

Such interpretation of the law is fraught with the most serious dangers to our constitutional system of division of powers which prohibits Congress from invading this field which has always been protected by the Bill of Rights and denies unto the legislature the right of creating laws prohibited by the Fifth and Sixth Amendments.

The verdict of the jury—"We find Tony Carminati guilty on Count 14"—did not include a judicial determination of guilt for the acts set forth in the recital of the deeds done or what would be done "as part of the conspiracy".

The allegations as written, the evidence adduced coupled with the explanations and instructions offered by the court, were, from all indications, simply a characterization of the illegal plan which the prosecution claimed the defendant had in mind.

Therefore, as distinguished from the effectuation of such plan, the ambiguity must be construed in favor of the defendant and the trial court, under no circumstances, was empowered to invade the province of the jury and conclude that the core of the conspiracy was too in violation of 21 U.S.C. 174 as amended by the Narcotics Control Act of 1956 and for that reason be subject to the harshest mandatory minimum sentence under that Act when a more lenient choice was available.

Petitioner makes this comment as to the cases cited by the Government in its opposition:—

None apply when compared to the facts in the instant case, but the court in the *Davis* case (279 F. 2d 576 at 578) does admit that if there is a showing that the defendant was misled, much less, prejudiced, by the reference to the Harrison Act, rather than to the appropriate sections of the current Act, he would, of course, be entitled to a new trial. (See petitioner's citation of cases on this point in Pet. brief: *U. S. v. Ogull*, 149 F. Supp. 272 (p. 25); *Boyd v. U. S.*, 116 U.S. 616, 8 S. Ct. 524, 532 (p. 40); *Amendolu v. U. S.*, 17 F. 2d 529 (p. 30); *Bazzell v. U. S.* 187 F. 2d 878 (p. 26).)

As to the second question propounded by the Government regarding the admitted failure of the trial court to ask petitioner, before sentencing, whether he had anything to say, required remand to the District Court for resentencing, your petitioner notes that in *Green* v. *U. S.*, 81 S. Ct. , this Court affirmed the decision of the lower court (256 F. 2d 483) because the record showed that the defendant was not denied the right to which Rule 32(a) entitled him.

In Anthony Carminati's case, present counsel was retained in September, 1959, began reading the record immediately thereafter and in December, 1959, discovered the trial court's error in failing to grant allocution. Appropriate relief under 28 U.S.C. 2255 was sought that same month and on January 11, 1960, appeared before the trial court and argued the motion. At that time it was pointed out that to grant the relief prayed for—that of resentencing the defendant properly in accordance with Rule 32(a), he would then be shown to be serving a ten year term and not a term of ten years and 309 days as he is doing now,—a definite benefit to the petitioner. (J.A. 56-58).

On February 18, 1960, in denying the motion, the court declared—"To grant this application • • • would be slavish adherence to form; it would exalt form over substance." J.A. 64).

This opinion was not only affirmed by the Appeals Court in 281 F. 2d 908, but the lower court admonished counsel in that opinion for even bringing up the subject thusly:

> "Carminati's contention that he should be given an opportunity for resentence because he was denied the right of allocution provided for in Rule 32(a) of the Federal Rules of Criminal Procedure is in this case so plainly without merit that we are not required to consider the question of whether this contention may be raised by a motion under 28 U.S.C. 2255. • • • "

Yet, at the oral hearing, the trial court, admitted:

> "In any event, it is clear, the record is clear that the defendant himself was not asked if there was any statement that he desired to make or why sentence should not be imposed. * * *(J.A. 50)
>
> The Prosecutor: Yes. It also appears that no request was made of your Honor to hear any statement by the defendant.
>
> The Court: I would not agree with those cases. I tell you that now. * * * I do not think there is a basic constitutional right involved here. I think this is a pure statutory right, and this may make some difference in the conclusion. If this were a constitutional right, it would be an entirely different matter. * * *I do not know of any constitutional provision that demands the court to ask a man at the time of sentence as to why sentence should not be imposed."

Your petitioner is still of the opinion that where the Federal Rules of Criminal Procedure are violated by the Court to the prejudice of the defendant, the defendant has not been afforded "due process" under the Constitution and therefore is not swayed by that court's opinion.

A reading of the record will further indicate that any attempt on the part of the trial court to shift the apparent error onto the court reporter is without merit (J.A. 20-43) because the record indicates other errors committed by the court were contrary to the remarks made in defense of the court's usual procedure. (J.A. 20-43)

At each and every point, just before sentence was imposed on the other defendants involved, including Salvatore and Ralph Russano, the court sought the guidance of either the clerk of the court or the prosecutor to determine whether or not the counts in the indictment called for punishment under the old or new narcotic acts and invariably, just prior to pronouncement of sentence, would ask of the prosecutor, as for example in the case of the defendant Galgano,

"Does the prosecutor desire to be heard?

The prosecutor: No, your Honor.

The Court: Again, in this instance no purpose would be served by any extended discussion of the nature of the crime. This defendant has a fairly extensive background of criminality and anti-social conduct, and one of his offenses includes an earlier sale of narcotics of which he was convicted in this court. * * * There is a conviction only on one count, is that right, the conspiracy count?

The Prosecutor: That is right, your Honor.

The Court: Under the circumstances the court imposes a sentence of ten years." (J.A. 37.)

And just prior to this episode, the court asked Galgano's counsel, *not* Galgano—"All right, is there anything that you desire to say on behalf of your client with respect to sentence and why sentence should not be imposed, other than what you have already said?

The record is clear that in this case, the defendant Carminati was denied the opportunity to which Rule 32(a) entitled him, and the court has admitted it.

Your petitioner has met the heavy burden of showing that he was not accorded the personal right which Rule 32(a) guarantees, and for that reason asks this Honorable Court to reject any contention that merely affording defendant's counsel the opportunity to speak fulfills the dual role of Rule 32(a). [*Taylor* v. *U. S.*, doc. #16726, Dec. 13, 1960, 9th Cir.]—*Green* v. *U. S.*, 81 S. Ct. , 1961—and find that his sentence was illegal and must be avoided, especially when anything his counsel did say did not plead any cause in mitigation of the sentence or why sentence should not have been pronounced.

"We do not doubt that (Carminati) has a record of anti-social behavior, but all the greater need for care lest, perhaps without fully realizing it, we tolerate a

little less than procedural due process for him, satisfying ourselves that normal requirements need 'not be so fastidiously insisted upon in the case of wicked people.' See *Malinski* v. *People of the State of New York*, 1945, 324 U.S. 401, 418, 65 S. Ct. 781, 790, 89 L. Ed. 1029. It must always be remembered that the innocent, for whose benefit primarily our fundamental procedural safeguards exist, can be protected effectively only if we insist strictly upon due process for all. The safeguard of procedural due process will be inadequate unless it shall be 'inexorable'. See classic statement of Mr. Justice Brandies in the *St. Joseph Stock Yards Co.* v. *U. S.*, 1936, 298 U.S. 38, 73, 56 S. Ct. 720, 80 L. Ed. 1033; cf. Mr. Justice Roberts, dissenting in *Snyder* v. *Com. of Mass.*, 1934, 291 U.S. 97, 137, 54 S. Ct. 330, 78 L. Ed. 674. If a few guilty persons win liberty thereby, the price is a small one to pay for the assurance we all gain that judicial procedure is and will be essentially 'fair.' *U. S.* v. *Claudy*, 204 F. 2d 624 (1953) (3rd Cir.)

The prosecution erred in this case to the detriment and prejudice of the defendant and the lower courts have affirmed those errors, but in light of the petition presented herein, Anthony Carminati prays that justice will prevail.

Respectfully submitted,

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